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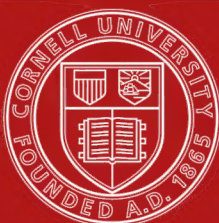
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A TREATISE

ON THE LAW OF

CHATTEL MORTGAGES

BY

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PREFACE.

In this work the author has endeavored to produce a complete and practical treatise on the law of chattel mortgages. It has been his aim to make a full classification of topics, systematically arranged, with a thorough discussion of the doctrine enunciated.

The current of authority has been stated in the text, and, where it has seemed of importance, the contrary doctrine in the following section.

As the validity of the contract depends largely upon the interpretation of statutory provisions, it has been found desirable, in some cases, to group the decisions of the various States in separate sections. This method, while it does not detract from the unity of the work, will greatly facilitate the practitioner in finding the law.

It is hoped that the profession will find in this work a complete systematic exposition of the subject. The author has gathered, analyzed and compared, and then formulated the rule from such investigation. If such labor and study, embodied in this work, meet the approval of a wise and discriminating bench and bar, and render them valuable assistance, his object will be accomplished.

THE AUTHOR.

BLOOMINGTON, Ill., June 1st, 1891.

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THE LAW OF CHATTEL MORTGAGES.

PART I.—THE NATURE AND REQUISITES OF THE CONTRACT.

CHAPTER I. DEFINITION AND DISTINCTION.

ARTICLE I.—DEFINITION—WHAT CONSTITUTES A CHATTEL MORTGAGE.

1. Common-Law Definition.
2. Equitable Definition.
3. Common-Law Definition Rejected.
4. Instruments Held to be Chattel Mortgages.
5. Oral Mortgages Good Between the Parties.
6. Statute of Frauds—Application of.
7. The Relation of Debtor and Creditor Must Exist.
8. Equitable Intention.

§ 1. **Common-Law Definition.**—A chattel mortgage is an instrument of sale, conveying title of property to the mortgagee with terms of defeasance, and if the terms of redemption are not complied with, then, at common law, the title becomes absolute in the mortgagee. The nature of the agreement must be such, that by the mere non-performance of the condition by the mortgagor, the title will be transferred to the mortgagee by the force of the agreement.¹ Or it is a conveyance of title upon condition, and it becomes an absolute interest at law, if not redeemed by the time stipulated, and it may be valid in certain cases without actual delivery.²

¹Parshall v. Eggart, 52 Barb. (N. Y.) 367; Heyland v. Badger, 35 Cal. 404; Hembree v. Blackburn, 16 Oreg. 153; Wright v. Ross, 36 Cal. 414.

²Langdon v. Buel, 9 Wend. (N. Y.) 80; Gifford v. Ford, 5 Vt. 532; McLean v. Walker, 10 Johns. (N. Y.) 471; Porter v. Parmley, 43 How. Pr. (N. Y.)

Under the common law a personal mortgage is more than a mere security; it is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition.¹

A distinction now exists between real-estate and chattel mortgages. While the character and effect of real-estate mortgages have changed under the influence of modern statutes and decisions, yet no such change has taken place in regard to chattel mortgages, nor has the distinction between real and personal mortgages been removed or affected by modern rulings. "There is a wide difference," says Judge Duer, "between a mortgage of lands and mortgage of chattels. In the first case, as the law in this State is now settled, the estate subject to the mortgage, remains in the mortgagor, is bound by a judgment, and may be sold under an execution against him; the mortgage is regarded merely as a security for the debt, and not as a transfer of the title. But a mortgage of personal chattels in all cases vests the legal title in the mortgagee, and when by the terms, or by the legal construction of the instrument, he has an immediate right to the possession, although the possession may not in fact have been changed, he is, in judgment of law, the absolute owner, and it is merely as his bailee and by his sufferance that the mortgagor retains the possession."²

§ 2. **Equitable Definition.**—In equity, a chattel mortgage is the transfer of the title to personal property, with or without possession, as a security for a debt or liability, upon

445; *Story on Bailm.* § 287; *Flanders v. Barstow*, 18 Me. 357; *Plummer v. Shirely*, 16 Ind. 380; *Whiting v. Eichelberger*, 16 Iowa 422; *McConnell v. People*, 84 Ill. 583; *Almy v. Wilbur*, 2 Woodb. & M. C. C. 371; *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Rhines v. Phelps*, 3 Gilm. (Ill.) 455; *Durfee v. Grinnell*, 69 Ill. 371; *Butler v. Miller*, 1 Denio (N. Y.) 407; *Sumner v. Batchelder*, 30 Me. 39; *Thornhill v. Gilmer*, 4 Sm. & M. (Miss.) 153; *Wood v. Dudley*, 8 Vt. 435; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Howland v. Willett*, 3 Sand. (N. Y.) 607; *Spriggs v. Camp*, 2 Spears (S. Car.) 181; *Bordick v. McVanner*, 2 Denio (N. Y.) 170; *Bank v. Jones*, 4 Comst. (N. Y.) 498; *Alden v. Lincoln*, 13 Met. (Mass.) 204.

¹ *Butler v. Miller*, 1 Comst. (N. Y.) 496.

² *Stewart v. Slater*, 6 Duer (N. Y.) 99. See, also, 2 Story's Eq. 1008, 1009.

condition that the transfer shall be void if the debt or liability be paid or discharged.¹ The interest of the mortgagee is considered as a mere lien—an equitable interest—which will prevail over creditors and subsequent claimants, although the mortgagee does nothing to reduce the property to possession.²

§ 3. **Common-Law Definition Rejected.**—Some of the States have rejected the common-law definition, and hold that a chattel mortgage conveys no title to property, but is a mere lien thereon. Thus, in Washington, a chattel mortgage, says Chief Justice Greene, is a mere security, under which no title can pass except by foreclosure and sale.³

It was so held in Oregon, that no title passes without foreclosure,⁴ but that decision is now virtually overruled.⁵

In New Jersey, Judge Depue says a chattel mortgage is regarded as a mere security for a debt, and does not entirely divest the property of the mortgagor.⁶ So, in Dakota,⁷ the equity rule in regard to chattel mortgages is adopted, as held by Chief Justice Tripp, and they do not convey title to property, but are a mere lien thereon.⁸

In Michigan, a chattel mortgage does not transfer a legal title until after foreclosure or something equivalent thereto. It only creates a lien.⁹

§ 4. **Instruments Held to be Chattel Mortgages.**—Many instruments are chattel mortgages though not so named. Thus, an instrument conveying goods, says Chief Justice Willie, requiring the grantee to dispose of the same within a specified time, to apply the proceeds to a debt due him

¹2 Story's Eq. § 1031.

²Mitchell v. Winslow, 2 Story C. C. 644.

³Boyd v. Forbes, 3 Wash. St. 318.

⁴Chapman v. State, 5 Oreg. 432.

⁵Case v. Campbell, 14 Oreg. 460; Hembree v. Blackburn, 16 Oreg. 153.

⁶Woodside v. Adams, 40 N. J. L. 417; Wilson v. Gray, 2 Stockt. 323.

⁷The admission of Dakota into the Union as two States has been of so recent date, it was thought best not to change the name.

⁸Grand Forks Nat. Bank v. Minneapolis, etc., Elevator Co., 43 N. W. Rep. 806; Comp. L. §§ 4330, 4331.

⁹Kohl v. Lynn, 34 Mich. 360. The equity rule prevails in Georgia and Texas as to chattel mortgages. See Cooch v. Gerry, 3 Harr. (Del.) 280.

from the grantor, he to return to the grantor any goods or money remaining, is a chattel mortgage.¹

So, as held by Chief Justice Gilfillan, a clause in a lease, reserving to the lessor a lien for the rent on the chattels of a lessee, placed on the demised premises, to be enforced on non-payment, by taking possession and sale of the property, is, in equity, a chattel mortgage.² But, in North Carolina, says Judge Ashe, an instrument purporting to be a mortgage of a bale of cotton to be made "during the year," is not a mortgage, but an executory contract merely.³

The following was held to be a chattel mortgage: "Received of A., \$25, in full payment for one black cow. * * * It is agreed by A. and B., that B. shall retain the property, use the same from this date to October first next; at which time, should B. pay A. \$25, then the property to remain B.'s; otherwise to be delivered up to A."⁴

So, where A.'s mare was served to B.'s stallion, and it was agreed in writing that A. should pay B. twenty dollars, in twelve months from date, if the mare proved with foal, "colt holden for payment;" this was, as held by Judge Virgin, a mortgage of the colt.⁵

But an instrument of writing by which the maker binds himself to pay a sum of money, mortgages and conveys a mule as security, with a recital that part of the debt is the purchase-money for the mule, and a further provision that it was to remain the vendor's property until paid for; it was held by Judge Simmons, that such an agreement was a conditional sale with reservation of title, and not a mortgage so far as the price of the mule is concerned.⁶

¹ *Texas Bank v. Lovenberg*, 63 Tex. 506.

² *Merrill v. Ressler*, 37 Minn. 82. For various contracts which have been declared chattel mortgages, see *Atwater v. Mower*, 10 Vt. 75; *Coty v. Barnes*, 20 Vt. 79; *Byrd v. Wilcox*, 8 Baxt. (Tenn.) 165; *Dunning v. Stearns*, 9 Barb. (N. Y.) 639; *McLean v. Klein*, 3 Dill. C. C. 113; *Harris v. Jones*, 83 N. Car. 317; *Merwine v. White*, 50 Ala. 388; *Ellington v. Charleston*, 51 Ala. 166; *De Leon v. Heguera*, 15 Cal. 483; *Whiting v. Eichelberger*, 16 Iowa 422.

³ *Atkinson v. Graves*, 91 N. Car. 99.

⁴ *Findley v. Deal*, 60 Ga. 359.

⁵ *Sawyer v. Gerrish*, 70 Me. 254.

⁶ *Smith v. De Vaughn*, 82 Ga. 574.

A bill of sale will not be declared a mortgage where the evidence shows that a third person held complainant's notes and controlled his interest in mining property as security; that he being about to sell the interest, complainant fearing it would not satisfy the note, obtained from defendant the money to pay the note and gave him a bill of sale in suit, and the note was canceled.¹

Chief Justice Reese, speaking for the court, says an instrument by which a debtor, for the purpose of securing a debt, conveys personal property to his creditor, giving him the possession thereof, with authority to sell the same and account to the debtor for the surplus, paying the debt so secured, together with the necessary expenses of sale is a chattel mortgage not only as between the parties, but also as to the creditors of the mortgagor.²

§ 5. **Oral Mortgages Good Between the Parties.**—As between the parties, a mortgage of chattels may be created by parol, and may be valid. No special words are necessary to its creation. It is enough that the transaction indicates an intention and agreement that the chattels shall stand as a security for the debt. Thus, a verbal agreement between the seller and the purchaser of a chattel, that the former shall have a mortgage on the chattel, if the note for the purchase-money is not paid at maturity, is a mortgage.³ And a verbal agreement to give and to accept security upon personal property is valid between the parties, although it is not valid against creditors and subsequent purchasers in good faith.⁴ And the delivery of a chattel by the purchaser, to one who is to become surety for the payment of the purchase-money, is a valid and legal mortgage. And the continuance of the possession and use of the property by the purchaser does not invalidate the right of the surety

¹ *Cake v. Shull*, 45 N. J. Eq. 208.

² *Sloan v. Coburn*, 26 Nebr. 607.

³ *Glover v. McGilvray*, 63 Ala. 508. S. P., *Morrow v. Tuney*, 35 Ala. 131; *Bardwell v. Roberts*, 66 Barb. (N. Y.) 433; *Bates v. Wiggin*, 37 Kans. 44.

⁴ *Conchman v. Wright*, 8 Nebr. 1; *Bank v. Jones*, 4 N. Y. 497.

to control the property upon the happening of the event which, by the agreement of the parties, was to render his interest absolute.¹ Where a verbal contract is made between an execution creditor and debtor, that the creditor shall purchase the chattel of the debtor at the execution sale, and hold the legal title as a security for the debt, it is a mortgage.²

§ 6. **Statute of Frauds—Application of.**—The eleventh section of the statute of frauds of California does not apply to mortgages, whether they contain the usual defeasance upon their faces, and thus create an open trust, or exist in the form of an absolute conveyance, with the understanding that they are intended as mortgages, and thus create a secret trust.³

§ 7. **The Relation of Debtor and Creditor Must Exist.**—Where the transaction does not create the relation of debtor and creditor between the parties, it is not a mortgage. If the relation of creditor and debtor exists and a debt subsists, it is a mortgage; but if the debt is extinguished by the agreement of the parties, or the money advanced was not by way of loan, and the grantor has the privilege of refunding, if he so desires, by giving time, and thereby entitling himself to a reconveyance, it is a conditional sale.⁴

§ 8. **Equitable Intention.**—In case of a chattel mortgage, no particular form of words is necessary, in order to give it that character. So, when a party claims a loan without having a technical mortgage, a court of equity will recognize and sustain it, whenever it appears from the transaction,

¹ *Ferguson v. Union Furnace Co.*, 9 Wend. (N. Y.) 345.

² *Loyd v. Currin*, 3 Hump. (Tenn.) 462. See, also, *Ceas v. Bramley*, 18 Hun (N. Y.) 187; *Ackley v. Finch*, 7 Cow. (N. Y.) 290. Several of the States have statutory provisions that every mortgage must be in writing. See California Civil Code, § 2922; Laws of Alabama of 1886, § 1731.

³ *Godchaux v. Mulford*, 26 Cal. 316. See, also, *Curtis v. Leavitt*, 17 Barb. (N. Y.) 309.

⁴ *Galt v. Jackson*, 9 Ga. 151; *Slee v. Morsalton Co.*, 1 Paige (N. Y.) 56; *Goodman v. Grierson*, 2 Ball & Beat. 274; *Conway v. Alexander*, 7 Cr. 237; *Robertson v. Crapsey*, 2 Edw. Ch. 138; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Holmes v. Grant*, 8 Paige (N. Y.) 243.

that it was the intention of the parties that a mortgage should be executed.¹

An equitable mortgage may be created by a verbal agreement. A verbal agreement to give a mortgage, based upon a consideration of a debt contracted on the faith of such agreement, will be upheld and enforced as a mortgage in a court of equity, as between the parties and their representatives, on the principle that equity will consider that as done which ought to have been done.²

ARTICLE II.—DISTINGUISHED FROM A PLEDGE.

9. Pledge—Definition and Distinction.

10. Passing of Title.

11. Collateral Security.

12. Further Illustrations.

§ 9. **Pledge—Definition and Distinction.**—A pledge is a delivery of personal property as a security for a debt, to be kept by the creditor until default or until the debt is discharged; there must be an actual delivery of possession, and the pledgee, to preserve his pledge, must retain possession.³ A delivery must be made in order to establish a pledge in elementary law. The character of this delivery must be dependent upon the circumstances which surround each transaction. This delivery may be symbolical where no statutory provisions interdict. Thus, a delivery may be made by the delivery of a bill of lading, or a warehouse receipt, or a delivery of a key to a building containing goods is a delivery of the goods.⁴

Unlike a chattel mortgage, the requirements of posses-

¹ *Whiting v. Eichelberger*, 16 Iowa 422.

² *Morrow v. Turney*, 35 Ala. 131.

³ *Dungan v. The Mutual Life Ins. Co.*, 38 Md. 242; *Raper v. Harrison*, 37 Kans. 243; *Nat. Exch. Bank v. Wilder*, 34 Minn. 149.

⁴ 2 Story's Eq. § 1030; 2 Kent's Com. 58; *Edwards' Bailm.* 201, 251, 252, 253; 1 Pars. Cont. 113; *The Dirigo Tool Co. v. Woodruff*, 41 N. J. Eq. 336; *Bateman's Com. Law.* §§ 674, 681; *Story's Bailm.* § 287.

sion in a pledge is inexorable in law. Want of possession is fatal, though the parties may act in good faith.¹

§ 10. **Passing of Title.**—In the chattel mortgage transaction the whole title passes conditionally to the mortgagee. If the condition is not complied with, the chattels become absolutely at law the property of the mortgagee.² In the case of a pledge, a special property only passes to the pledgee, the general property remaining in the pledgor, and the right of the pledgee is not consummated, except he has possession, and generally when that possession is relinquished, the right of the pledgee is extinguished.³ Possession is not, nor may not be, essential to create a chattel mortgage and title in the mortgagee.⁴

§ 11. **Collateral Security.**—Collateral security has been applied in late transactions of the pledge character, and it is difficult to distinguish whether the contract is a pledge or a chattel mortgage. Collateral security seems to embrace both pledge and chattel mortgage transactions, but applies more appropriately to pledges, and especially of incorporeal chattels. The test is difficult to apply, inasmuch as so many new kinds of incorporeal chattels have sprung up, and because of local statutes which make the two classes quite alike.⁵

¹ *Casey v. Covoroc*, 96 U. S. 467; *Seymour v. Colburn*, 43 Wis. 67; *Williams v. Gillespie*, 30 W. Va. 586.

² *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Parks v. Hall*, 2 Pick. (Mass.) 206; *Brown v. Bennett*, 8 Johns. (N. Y.) 96; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; 2 Story's Eq. §§ 1030, 1031; *Ackley v. Finch*, 7 Cow. (N. Y.) 290.

³ *Brownell v. Hawkins*, 4 Barb. (N. Y.) 491; *Conrad v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 449; *Jones v. Smith*, 2 Ves. Jr. 378; *Lickbarrow v. Mason*, 6 East 25, note; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Ryal v. Rolle*, 1 Atk. 167; *Day v. Swift*, 48 Me. 368; *Evans v. Darlington*, 5 Blackf. (Ind.) 320.

⁴ *Kimball v. Hildreth*, 8 Allen (Mass.) 168; *Eastman v. Avery*, 23 Me. 248; *Russell v. Fillmore*, 15 Vt. 135; *Walker v. Staples*, 5 Allen (Mass.) 34; *Jewitt v. Warren*, 12 Mass. 300; *Homes v. Crane*, 2 Pick. (Mass.) 610; *Ferguson v. Lee*, 9 Wend. (N. Y.) 61; *Heyland v. Badger*, 35 Cal. 404; *Wood v. Dudley*, 8 Vt. 430; *White v. Cole*, 24 Wend. (N. Y.) 116; *Barfield v. Cole*, 4 Sneed (Tenn.) 465; *Tannahill v. Tuttle*, 3 Mich. 110; *Doak v. Bank*, 6 Ired. (N. Car.) L. 309; *Eastman v. Avery*, 23 Me. 248; *Wright v. Ross*, 36 Cal. 414; *Gifford v. Ford*, 5 Vt. 532; *Connor v. Carpenter*, 28 Vt. 237; *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Sims v. Canfield*, 2 Ala. 555.

⁵ See *Belden v. Perkins*, 78 Ill. 449; *Gay v. Moss*, 34 Cal. 125; *Leach v. Kimball*, 34 N. H. 568; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Stearns v. Marsh*, 4 Denio (N. Y.) 227.

An instrument expressly transferring to a party notes, together with a chattel mortgage securing the same as collateral security for the payment, upon condition that if default is made in the payment of the last-named notes, then the party was authorized to collect the former notes, or to negotiate them for the purpose to liquidate the last-described note, is a chattel mortgage.¹

If the transfer is for collateral security, and it conveys the legal title to the second party, on default the chattels become the property of the second party.²

If a note and mortgage are sold by the owner, by an instrument in writing which conveys the legal title, and contains a defeasance in the usual form of a chattel mortgage, and a further provision that the instrument is made for the purpose of securing a sum of money, and for no other purpose, and that if the assignee collects the money, he is to account to the assignor for the excess, and a still further provision that the assignee will insure the buildings on the premises covered by the mortgage assigned, and that the premium shall be a lien on the note mortgaged—the instrument will be treated as a chattel mortgage, and not as a pledge, and upon default of the mortgagor, the title at law will vest in the assignee.³

§ 12. **Further Illustrations.**—A contract was made between a grain dealer and a bank; the latter to furnish the former advances and to take as security warehouse receipts, the bank having the power to sell in case of default; it was also agreed that in case of floods, the grain was at the risk of the owner. The grain was stored by third parties in warehouses on wharves. While thus stored, a sudden and unexpected flood damaged it, the owner trying to save it from the flood. This contract was construed by the court

¹*Fraker v. Reeve*, 36 Wis. 85. See, also, *Brown v. Bennett*, 8 Johns. (N. Y.) 96; *Atwater v. Mower*, 10 Vt. 75.

²*Nichols v. Webster*, 1 Chand. (Wis.) 203; *Flanders v. Thomas*, 12 Wis. 410.

³*Wright v. Ross*, 36 Cal. 414.

as a pledge and not a mortgage, and that the owner must bear the loss.¹

A receipted bill of parcels of chattels, purporting to be on its face a security for a debt, is a pledge and not a mortgage.² And where the owner of a stock of goods, bought at a chancery sale, agreed in writing, in order to indemnify his surety on the purchase-notes, to turn over to a receiver who should superintend the business, and weekly pay the receipts over to the surety, such agreement is in the nature of a pledge and not a mortgage.³ But in many cases, whether the transaction shall be treated as a mortgage or a pledge, must depend upon the intention of the parties.⁴

ARTICLE III.—ASSIGNMENTS DISTINGUISHED.

13. Distinction.

14. When a Chattel Mortgage will be Construed as an Assignment.

15. Illustrations.

16. When an Assignment is Construed as a Mortgage.

17. Intention Must Control.

18. Parol Evidence.

§ 13. **Distinction.**—A fundamental distinction between a chattel mortgage and an assignment for the benefit of creditors, is that a mortgage is a mere security for a debt, the equity of redemption remaining in the mortgagor, while an assignment is more than a security for a debt, and is an absolute appropriation of the property to its payment. It does not create a lien in the creditors, but passes both the legal and equitable title to the property absolutely beyond the control of the assignor. It leaves no equity of redemption as in the case of a chattel mortgage.⁵

The sale and transfer by a debtor of his personal property

¹ *British Columbia Bank v. Marshall*, 8 Saw. C. C. 29.

² *Thompson v. Dolliver*, 132 Mass. 103.

³ *McCready v. Haslock*, 3 Tenn. Ch. 13.

⁴ *Ward v. Sumner*, 5 Pick. (Mass.) 59.

⁵ *Weber v. Mick*, 131 Ill. 520.

to a creditor to sell and to pay the debtor's debts, the debtor reserving the surplus, is in effect a chattel mortgage. In an assignment the debtor would have no control over the property transferred.¹

A voluntary assignment is an instrument in writing executed by a failing debtor, by which he assigns or transfers to some third person, as assignee or trustee, the whole or sometimes the bulk of his property, to be by such trustee distributed among the assignor's creditors in satisfaction of their demands. It differs materially from a mere sale in payment of a debt, and also from a pledge or hypothecation of property in the nature of a mortgage. The act referring to voluntary assignments cannot be applied to other subjects; it has nothing to do with chattel mortgages.²

Where the assignee is to complete the process of manufacture of the assigned property, and prepare the same for sale, such condition is not inconsistent with his duties as a mortgagee, and consequently does not render the assignment void.³ Conveying certain specified articles of personal property to a trustee, with power to sell the same, and from the proceeds pay certain specified debts, and the residue to the grantor, is a *quasi* mortgage, and not a voluntary assignment of all the grantor's property for the benefit of his creditors.⁴ And an instrument not sufficient under the statute as an assignment for the benefit of creditors, may be good as a mortgage of personal property.⁵ So, an assignment by a debtor, of his property, for the benefit of his creditors, binding the trustee to sell and pay his own debts, reserving the surplus to the assignor, is in effect a chattel mortgage.⁶ So, when it appears that an instrument transferring title to chattels, is intended merely as a security, and the debtor has

¹Doggett v. Bates, 26 Ill. App. 369.

²Weber v. Mick, 131 Ill. 520.

³Smith v. Beattie, 31 N. Y. 542.

⁴Fouke v. Fleming, 13 Md. 392. See, also, Wilson v. Russell, 13 Md. 494; Hempstead v. Johnson, 18 Ark. 123.

⁵Davidson v. King, 47 Ind. 372.

⁶McClelland v. Remsen, 36 Barb. (N. Y.) 622. See Henshaw v. Sumner, 23 Pick. (Mass.) 446; Catlin v. Currier, 1 Saw. C. C. 7.

the right to redeem within a reasonable time, though there is no express defeasance, such an instrument is a chattel mortgage.¹

Likewise, assigning property to creditors for the purpose of securing their demands, is in legal effect a mortgage, and creates a specific lien on the property.²

So, an assignment by a debtor to a creditor of all his personal property and choses in action, for the payment of debts, with a provision for the return of the surplus, is in effect a mortgage, and not void under the statute of trusts, as for the use of the person making it.³

§ 14. **When a Chattel Mortgage will be Construed as an Assignment.**—Where chattel mortgages and assignment of accounts, transferring the entire property of the insolvent debtor to certain of his creditors, with the intent that one of such creditors, for himself and as agent and trustee for the others, should take immediate possession and convert such property into money, and divide the same *pro rata* among such creditors, they must be held to be, in effect, a general assignment with preferences.⁴ This is in accord with the principle that several mortgages and assignments, when made in pursuance of the same agreement and substantially at the same time, and for the same common purpose, and in relation to the same subject-matter, must be construed together as constituting one paper in law.⁵

Two mortgages and a confessed judgment may constitute an assignment, by reason of the intention of the parties and the operation of the instruments.⁶

¹ Gage v. Chesebro, 49 Wis. 486.

² Leitch v. Hollister, 4 Comst. (N. Y.) 211.

³ Dunham v. Whitehead, 21 N. Y. 131. See Godchaux v. Mulford, 26 Cal. 316. Compare Brown v. Webb, 20 Ohio 389, and case cited.

⁴ Winner v. Hoyt, 66 Wis. 227.

⁵ Van Patten v. Burr, 52 Iowa 518; Gillman v. Henry, 53 Wis. 468.

⁶ White v. Cotzhausen, 129 U. S. 329.

It is necessary to consider the statutory provisions to determine the nature of the instrument. The Wisconsin law provides that "all voluntary assignments or transfers whatever * * * shall be void as against the creditors of the person making the same, unless" executed as therein required. Sec. 1694, R. S., that "any and all assignments * * * made for the benefit of creditors, which shall contain or give any preferences to one creditor over another creditor, except for the wages of laborers, * * *

§ 15. **Illustrations.**—A chattel mortgage was made and taken by the mortgagee in good faith to secure a debt due to the latter. At the date of its execution the mortgagor was hopelessly insolvent, though the fact of the insolvency was unknown to both parties. The General Statutes of South Carolina, Section 2015, allow no preferential assignments on the part of the insolvent party if made within ninety days of the general assignment. It was decided under these circumstances that the mortgage could not be set aside; that no general assignment had been made, and the transaction was in good faith.¹

Where a debtor executed a chattel mortgage to secure the payment of a *bona fide* pre-existing debt, and soon thereafter executed a general assignment of his property for the benefit of his creditors, but which assignment was abandoned by the assignee and all parties in interest, and the mortgaged property taken possession of by the mortgagee, the mortgage will be upheld, even though it was executed on the same day and nearly the same time at which the assignment was executed.²

A mortgage made by an insolvent debtor to secure a valid claim, is not invalid because it was executed while a suit was pending by another creditor against the mortgagor for collection of a debt, and because it was made to give the mortgagee the preference over such other creditor.³

§ 16. **When Assignment is Construed as a Mortgage.**—In general, an assignment by a debtor to a creditor of all his personal property and choses in action, for the payment of a debt, with a provision for a return of the surplus, is in effect a mortgage.⁴ So, an instrument not sufficient under the

shall be void." Sec. 1, ch. 349, Laws of 1883. In Missouri it is held that a deed of trust to secure the debts of two creditors is an assignment. *Martin v. Hausman*, 14 Fed. Rep. 160; *Crow v. Beasley*, 68 Mo. 435; and see *Hargadine v. Henderson*, 97 Mo. 375.

¹ *Wietz v. Potter* (S. Car.), 32 Fed. Rep. 888.

² *Bierbower v. Polk*, 17 Nebr. 268. The Nebraska statute allows an insolvent debtor to prefer a creditor. See Laws of 1877, Com. 1881, ch. 6.

³ *Ayres v. Adams*, 82 Ind. 109.

⁴ *Dunham v. Whitehead*, 21 N. Y. 131.

statute as an assignment for the benefit of creditors, may be good as a chattel mortgage.¹

§ 17. **Intention Must Control.**—The intention of the parties, as gathered from the whole transaction, must determine its legal character. The law will not be blinded by forms or names, but will look beyond, to the substance of the transaction, and fix the character according to the intention of the parties. The giving of one or more mortgages, the confession of judgments, or other means adopted to give security or preference, may not necessarily be an assignment. But where one or more instruments are executed by a debtor, in whatsoever form or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee, to raise a fund to pay debts, the transaction constitutes an assignment.²

§ 18. **Parol Evidence.**—Parol evidence may be given to show that mortgages and an assignment of accounts were executed by a debtor, with the intention of transferring all his chattels to certain preferred creditors, to be converted by one of them into money, and then divided among them *pro rata*. A conveyance and bill of sale absolute in form, may nevertheless be shown by parol evidence to be nothing more than a mortgage or security. Whether it be one or the other, is very often a question depending wholly upon the intention. So, whether a written instrument constitutes a conditional sale, a conveyance absolute, or mortgage, is very often a question of intention, to be determined by contemporaneous facts and circumstances. Hence, resort may be had to contemporaneous facts and evidence to determine whether several mortgages and an assignment are to be taken together as a mortgage.³

¹Davidson v. King, 47 Ind. 372. See Section 13.

²Richmond v. Mississippi Mills, 52 Ark. 30. See, also, Turner v. Watkins, 31 Ark. 437; Hoffman v. Mackall, 5 Ohio St. 124; Caldwell's Bank v. Crittenden, 66 Iowa 237.

³Winner v. Hoyt, 66 Wis. 227.

ARTICLE IV.—CONDITIONAL SALE DISTINGUISHED.

19. Distinction.
20. Instruments Under Seal.
21. As to Intention.
22. Condition Precedent.
23. Character of the Conveyance.
24. When the Relation of Debtor and Creditor is not Created.
25. When the Relation of Debtor and Creditor is Created.
26. Equitable Rule of Construction.
27. Parol Evidence.

§ 19. **Distinction.**—Where the purchaser of chattels is bound by the contract to do anything as a condition, either precedent or concurrent, on which the title depends, the property will not pass until the condition is fulfilled, even though the chattels may have been delivered into possession of the vendee.

When there is a condition precedent, the chattels do not vest in the purchaser on delivery, nor until the condition is performed; the right to the property still remains in the vendor, under the common law, even against creditors and subsequent purchasers of the vendee.¹

When goods are sold at a fixed price to be paid on a day certain, and delivery is therefore made, with the agreement that until the price is paid the title is to remain in the vendor, it is a conditional sale, and until the condition is fulfilled the title remains in the vendor.² And the vendor can reclaim

¹ *Chase v. Pike*, 125 Mass. 117; *Drury v. Hervey*, 126 Mass. 519; *Preston v. Whitney*, 23 Mich. 260; *Goodman v. Pleasant*, 23 Ga. 205; *Winchester v. King*, 46 Mich. 102; *Herring v. Hoppcock*, 15 N. Y. 409; *Dannefelser v. Weigel*, 27 Mo. 45; *Locomotive Works v. Lewis*, 4 Dill. C. C. 158; *Holt v. Holt*, 58 N. H. 276; *Morris v. Rexford*, 18 N. Y. 552; *Cardinell v. Bennett*, 52 Cal. 476; *Hegler v. Eddy*, 53 Cal. 597; *Sims v. Wilson*, 47 Ind. 226; *Domestic Sewing Machine Co. v. Arthursultz*, 63 Ind. 322; *Mosely v. Shattuck*, 43 Iowa 540; *Sanders v. Keber*, 28 Ohio St. 630; *Re Binford*, 3 Hughes C. C. 295; *Truman v. Hardin*, 5 Saw. C. C. 115; *Fosdick v. Car Co.*, 99 U. S. 256; *Carroll v. Wiggins*, 30 Ark. 402; *Brown v. Fitch*, 43 Conn. 512; *Jowers v. Blandy*, 58 Ga. 379; *Wright v. Pierce*, 4 Hun (N. Y.) 351; *Sage v. Sleutz*, 23 Ohio St. 1; *Gorham v. Holden*, 79 Me. 317; *McGinnis v. Savage*, 29 W. Va. 365; *McComb v. Donald*, 82 Va. 903; *Campbell Printing and Mfg. Co. v. Walker*, 22 Fla. 412; *In re Lyon* (Minn.), 7 Bank. Reg. 182; *The Marina* (N. J.), 19 Fed. Rep. 760; *Harkness v. Russell*, 118 U. S. 663; *Rowan v. Union Arms Co.*, 36 Vt. 124.

² *Hotchkiss v. Hunt*, 49 Me. 219; *Bunker v. McKenney*, 63 Me. 529; *Fifield*

these chattels, at common law, when the price has not been paid, even from those who have taken a mortgage on them, without notice and in good faith.¹

A contract that a bailee of chattels shall pay a stated sum monthly, as rent for the use therefor, and that when the price fixed upon the goods in that way is fully paid, they shall become the property of the bailee, amounts to a conditional sale.² But when a party sold to another a quantity of machinery in consideration of \$200 cash in hand, \$600 in notes due at a certain date, and \$600 more in notes due at a still later date, and the delivery of an engine valued at \$400; and by the terms of the contract the legal title to the property sold was to remain in the vendor, who might take possession at any time after the maturity of the notes or either of them; and that the clause providing that the title should not pass until the notes were paid, gave to the instrument the character of a mortgage instead of a conditional sale.³

A written contract stipulating for a lease of chattels valued at a fixed sum, with an agreement for monthly payments therefor, and a provision that if the lessee should be in default therefor, he should return the property and pay interest on the deferred installments for the time he had it,

v. Elmer, 25 Mich. 48; *Porter v. Pettingill*, 12 N. H. 299; *Whitney v. Eaton*, 15 Gray (Mass.) 225; *Little v. Page*, 44 Mo. 412; *Shaffer v. Sawyer*, 123 Mass. 294; *Sage v. Sleutz*, 23 Ohio St. 1; *Everet v. Hall*, 67 Me. 497; *Sewall v. Henry*, 9 Ala. 24; *Buckmaster v. Smith*, 22 Vt. 203; *Gambling v. Read*, 1 Meigs (Tenn.) 281; *Tibbets v. Towle*, 3 Fairf. (Me.) 341; *Copeland v. Bosquet*, 4 Wash. C. C. 588; *Bennett v. Simms*, 1 Rice (S. Car.) 421; *Parris v. Roberts*, 12 Ired. (N. Car.) 268; *Buson v. Dougherty*, 11 Humph. (Tenn.) 50; *Wood M. & R. Co. v. Brooks*, 2 Saw. C. C. 576; *Bigelow v. Huntley*, 8 Vt. 151; *Duncan v. Stone*, 45 Vt. 118.

¹*Enlow v. Klein*, 79 Pa. St. 488; *Hotchkiss v. Hunt*, 49 Me. 218; *Price v. Jones*, 3 Head (Tenn.) 84; *Hirschorn v. Canney*, 98 Mass. 149; *Sumner v. McFarlan*, 15 Kans. 600; *Hallowell v. Milne*, 16 Kans. 65; *Sargeant v. Metcalf*, 5 Gray (Mass.) 306; *Benner v. Puffer*, 114 Mass. 376; *Baker v. Hall*, 15 Iowa 277; *Hart v. Carpenter*, 24 Conn. 427; *Little v. Page*, 44 Mo. 412; *Griffin v. Pugh*, 44 Mo. 326; *Coggill v. Hartford & N. H. R. Co.*, 3 Gray (Mass.) 545; *Clark v. Wells*, 45 Vt. 4; *McNeil v. Nat. Bank*, 55 Barb. (N. Y.) 59; *Hunter v. Warner*, 1 Wis. 141; *Dunbar v. Rawles*, 28 Ind. 225; *Lacker v. Rhoades*, 45 Barb. (N. Y.) 499; *Herring v. Willard*, 2 Sandf. (N. Y.) 418.

²*Gerrish v. Clark*, 64 N. H. 492.

³*Talbott v. Sandifer*, 27 S. Car. 623.

at the option of the owner ; that the property should not be removed from the premises ; that no agreement of sale should be implied ; and that no sale of it should be valid without the owner's receipt, is a conditional sale and not a mortgage.¹

An owner of a stock of goods in a store made a contract with a vendee, by which the former agreed to sell and the latter to buy the goods. The buyer was to have possession of the goods with full authority to sell the same as a retail dealer ; the legal title to the goods was to remain in the vendor until the price was paid, with a specified rate of interest. It was further agreed that the title should vest in the purchaser in proportion to the amount paid. The buyer was to pay the expenses of the store and to purchase new goods in the regular course of trade, and to withdraw a certain sum monthly for his own use, and keep the goods insured. This transaction was a conditional sale and not a mortgage.²

And in general the test to be applied to distinguish a chattel mortgage is this : Whenever a transaction resolves itself into a security for a debt, it is a mortgage. The right of redemption must exist to constitute a mortgage, so that the debtor shall be entitled to a release of his property on the termination of the debt.³

An instrument must be considered a mortgage, if taken alone or in connection with surrounding facts, when it appears to have been given as a security. The mere absence of terms of defeasance cannot determine whether it is a mortgage or not. An instrument purporting to be a bill of sale, but stating that it was given as security for money advanced, reciting a consideration of only \$1,200, but purporting to convey articles in process of manufacture worth \$3,000, is a chattel mortgage.⁴

§ 20. **Instruments Under Seal.**—An instrument was given under seal, the consideration being \$430 cash in hand, con-

¹ *Gerow v. Castello*, 11 Colo. 560.

² *Blanchard v. Cooke*, 144 Mass. 207.

³ *Wilmerding v. Mitchell*, 42 N. J. L. 476.

⁴ *Cooper v. Brock*, 41 Mich. 488.

veying to the purchaser certain chattels, on the condition that he should, within six months, pay \$75 for one portion of the chattels, or \$150 for another part, or \$250 for another portion. On this payment being made, then the instrument as to these articles should be void, and to allow the purchaser to redeem said articles severally by the payment of the respective sums of money, and to have a resale by which he was to have an absolute bill of sale for any article redeemed, the purchaser to hold possession. In the absence of testimony as to the surrounding circumstances under which the agreement was executed, the transaction must be regarded as a mortgage, and not a conditional sale.¹ But an instrument under seal in the following words is a conditional sale: "I promise to pay A. the sum of \$150 for one bay horse, and to secure the same, the horse stands as his own security."²

§ 21. **As to Intention.**—A conveyance to secure a subsisting debt is a mortgage, whatever may be the form of the writing, or however it may appear on its face. Where the facts of the transaction leave it questionable whether a mortgage or conditional sale was intended, the doubt is to be resolved in favor of the mortgage. It is not true that a deed absolute in its terms, delivered in payment of a debt, is converted into a mortgage merely because the grantee therein gives a contemporaneous stipulation binding him to reconvey on being reimbursed, within an agreed time, in an amount equal to the debt and interest therein. If a conveyance extinguishes a debt, the parties so intending, so that a plea of payment would bar an action thereon, the transaction would be a conditional sale notwithstanding. In a test as to whether the transaction is a mortgage or conditional sale, the understanding and purposes of the parties are to be considered. If they intend an extinguishment of recovery upon specific terms, such a transaction is a conditional sale and not a

¹Musgat v. Pumpelly, 46 Wis. 660.

²Clayton v. Hester, 80 N. Car. 275, modifying Deal v. Palmer, 72 N. Car. 582. See Ellison v. Jones, 4 Ired. (N. Car.) 48; Gaither v. Teague, 7 Ired. (N. Car.) 460; Ballow v. Sudderth, 10 Ired. (N. Car.) 176; Parriß v. Roberts, 12 Ired. (N. Car.) 268.

mortgage.¹ A conveyance to secure a debt is a mortgage, and the stipulation of the parties cannot make it otherwise. But a conveyance to pay a debt is a totally different affair. The inquiry is whether the instrument was intended as a sale or as security for a debt, and the extrinsic evidence, as well as the terms of the deed, must be examined to determine the question.²

A sale of goods for a certain sum, with further agreement that if, when sold, more than said sum should be realized, the excess, after taking out expense of sale, should be credited to the vendee, is valid in the absence of fraud, and with the stipulation for a conditional contingent consideration. It does not, *ex necessitate*, transmute a sale into a pledge or mortgage.³

§ 22. **Condition Precedent.**—A vendor can name a condition precedent in a conditional sale, and whether he does so, is a question of fact to be determined from the evidence of the case.⁴

In a contract for the sale of property with a condition precedent, the title does not pass to the purchaser until he has performed the condition precedent.⁵

§ 23. **Character of Conveyance.**—If it is the purpose of the parties to a conveyance to extinguish a debt existing between them, the grantor having the privilege of refunding, and thus entitled to a reconveyance, it is a conditional sale. If their object is a loan of money, a security and pledge for its repayment, and the relation of debtor and creditor existing notwithstanding the transfer of the property, it is a mort-

¹ Turner v. Kerr, 44 Mo. 429.

² Conway v. Alexander, 7 Cr. (U. S.) 218.

³ Reeves v. Sebern, 16 Iowa 234.

⁴ Seed v. Lord, 66 Me. 580; Stone v. Perry, 60 Me. 48; Whitney v. Eaton, 15 Gray (Mass.) 225.

⁵ Sanders v. Kerber, 28 Ohio St. 630; Clark v. Jack, 7 Watts (Pa.) 375; Chamberland v. Smith, 44 Pa. St. 431; Harvey v. Locomotive Works, 93 U. S. 664; Greer v. Church, 13 Ky. 430; Chissolm v. Hawkins, 11 Ind. 316; Preston v. Whiting, 23 Mich. 266; Latham v. Summer, 89 Ill. 234; Flick v. Warner, 25 Kans. 492; Hine v. Roberts, 48 Conn. 268; Stadfield v. Man. Co., 92 Pa. St. 52; Lucas v. Campbell, 88 Ill. 447; Jowers v. Blandy, 58 Ga. 379; Boon v. Moss, 70 N. Y. 465; Barrett v. Pilchard, 2 Pick. (Mass.) 513.

gage.¹ The existence of a debt is a true test whether a transaction is a sale or mortgage. A debt either pre-existing or created at the time is an essential requisite to a mortgage.²

When the language of the instrument is equivocal, the intention of the parties, as evidenced by the whole transaction and the attending circumstances, seems to be the true criterion.³ Where a deed and memorandum import a sale, but the evidence in the case shows that they were held as a mere security, they are a mortgage.⁴

The facts that the grantor continued in possession, controlling, using and improving the property as his own, and receiving and using the rents and profits thereof as his own, and paying the taxes thereon, were regarded as significant.⁵ Once a mortgage always a mortgage, is the rule generally recognized. So, the want of a personal agreement by the borrower to repay the money is not conclusive that the conveyance was not intended as a mortgage, but merely a circumstance to be considered with the other evidence in the case.⁶

Often, through a misapprehension of the law by one or both parties, or by a design on the part of one or both parties to cover up the real purpose of the transaction, it is often so confused that it may contain some of the incidents of a mortgage, and also of a conditional sale. To solve this difficulty, courts often hold the transaction to be a mortgage,

¹*Hoopes v. Bailey*, 28 Miss. 328; *Hickman v. Cantrell*, 9 Yerg. (Tenn.) 172; *Pointdexter v. McCannon*, 1 Dev. (N. Car.) Eq. 373; *Bishop v. Rutledge*, 7 Marsh. J. J. (Ky.) 217; *Haynie v. Robertson*, 56 Ala. 37; *McGinnis v. Hart*, 4 Bibb (Ky.) 327; *Harrison v. Lee*, 1 Litt. (Ky.) 191; *Johnson v. Clark*, 5 Ark. 321.

²*Sutphen v. Cushman*, 35 Ill. 186; *Henley v. Hotaling*, 41 Cal. 22; *Horn v. Keteltas*, 46 N. Y. 605; *Perkins v. Drye*, 3 Dana (Ky.) 170; *Locke v. Palmer*, 26 Ala. 312; *Smith v. Quartz Mining Co.*, 14 Cal. 242.

³*Clark v. Henry*, 4 Com. (N. Y.) 324; *Edrington v. Harper*, 3 Marsh. J. J. (Ky.) 354; *Hughes v. Sheaff*, 19 Iowa 343; *Cornell v. Hall*, 22 Mich. 377; *Rich v. Doane*, 35 Vt. 125; *Pitts v. Cable*, 44 Ill. 105; *Williams v. Owen*, 5 Mylne & Craig 306; *Goodman v. Grierson*, 2 Ball & Beatty 278.

⁴*Russell v. Southard*, 12 How. (U. S.) 139.

⁵*Wilson v. Giddings*, 28 Ohio St. 554.

⁶*Horn v. Keteltas*, 46 N. Y. 605.

in all doubtful cases, as justice is more apt to be administered and fraud suppressed by such a construction.¹

And whether an instrument in itself is a mortgage, is a question of law, to be determined by the court.²

§ 24. **When the Relation of Debtor and Creditor is not Created.**—Whether an instrument is a conditional sale, a conveyance or a mortgage is a question which has often perplexed the courts. As a general rule, when the language of the instrument is equivocal, the intention of the parties, as evinced by the whole transaction and the attending circumstances, seems to be the true criterion.³ But when the instrument is equivocal in its terms, and the relation of debtor and creditor is not created by the transaction, and never existed, and the purchaser takes and retains possession of the goods, and their value is equal to the consideration expressed, or is not perceptibly in excess of it, and there is nothing to indicate an intent to transfer the chattels as a mere security, the transaction is generally held a conditional sale and not a mortgage.⁴

So, where the relation of debtor and creditor exists, and the debt still remains, the transaction is considered a mortgage; but a conditional sale is where the debt is extinguished by the agreement of the parties in making the conveyance of property, and the grantor has the privilege of refunding and is entitled then to a reconveyance.⁵

The condition by which to determine whether a transac-

¹*Russell v. Southard*, 12 How. (U. S.) 139; *Edrington v. Harper*, 3 Marsh. J. J. (Ky.) 354; *Hughes v. Sheaff*, 19 Iowa 343; *Cornell v. Hall*, 22 Mich. 377; *Rich v. Doane*, 35 Vt. 125.

²*Comron v. Standland*, 103 N. Car. 207.

³*Goodman v. Grierson*, 2 Ball & Beatty 278; *Williams v. Owen*, 5 Mylne & Craig 306.

⁴*McNamara v. Culver*, 22 Kans. 661; *Henley v. Hotaling*, 41 Cal. 22; *Ford v. Irwin*, 18 Cal. 117; *Pearson v. Seay*, 35 Ala. 612; *West v. Hendrix*, 28 Ala. 226; *Woodward v. Pickett*, 8 Gray (Mass.) 617; *Rockwell v. Humphrey*, 57 Wis. 410; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Saxton v. Hitchcock*, 47 Barb. (N. Y.) 220; *Baker v. Thrasher*, 4 Denio (N. Y.) 493; *Holmes v. Grant*, 8 Paige (N. Y.) 243; *Conway v. Alexander*, 7 Cr. (U. S.) 237; *Perry v. Meddowcraft*, 4 Beav. 197.

⁵*Hoopes v. Bailey*, 28 Miss. 328. See *Smith v. Crosby*, 47 Wis. 160; *Rich v. Doane*, 35 Vt. 125.

tion is a mortgage or a conditional sale is this: If the relation of debtor and creditor remains, and the debt still subsists between the parties, it is a mortgage; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding it if he pleases by a given time, and thereby entitling himself to a reconveyance, it is a conditional sale.¹

An absolute sale of personal property, but reserving to the grantor the right to redeem the property by a specified time, and the instrument containing also a stipulation on his part, in the event of his failure to redeem, that he would pay a certain sum for the use of the property in the meantime, is a conditional sale and not a mortgage.² But where the relation of debtor and creditor is continued between the parties as to the consideration of the conveyance, the transaction will generally be treated as a mortgage.³

In an answer to a contention that the transaction could not be a mortgage because there was no bond collateral to the deed, nor any covenant to pay, it was held that if the intention was that it should be a mortgage, the absence of a covenant and collateral bond would not make it the less so.⁴

The courts will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mortgage; but it is equally clear that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not, of itself, entitle the vendor to redeem.⁵ But some of the courts hold that the only criterion is the existence or non-existence of a debt. If, after the transaction is completed, no debt remains, there is no mortgage, but only a conditional sale.⁶

¹ *Slowey v. McMurray*, 27 Mo. 113.

² *Logwood v. Hussey*, 60 Ala. 417.

³ *Hughes v. Sheaff*, 19 Iowa 335.

⁴ *Goodman v. Grierson*, 2 Ball & Beatty 278.

⁵ *Williams v. Owens*, 5 Mylne & Craig 306.

⁶ *McNamara v. Culver*, 22 Kans. 661.

§ 25. When the Relation of Debtor and Creditor is Created.—

When the relation of debtor and creditor is created by the transaction or pre-existed, and by express language or fair implication continues, and the possession is retained by the vendor, and the value of the property is greatly in excess of the consideration paid, the transaction has usually been held a mortgage.¹

If a deed and memorandum import a sale, yet if, from all the evidence in the case, it is shown to be a mere security, it will be considered a mortgage.² Once a mortgage always a mortgage, is the rule generally adopted. So, the want of a personal agreement by the borrower to repay the money is not conclusive that the conveyance was not intended as a mortgage, but merely a circumstance to be considered with the other evidence in the case.³ The existence of a debt is a valuable test whether a transaction is a sale or a mortgage,⁴ and the character of the transaction is fixed at its inception, and unless the relation of debtor and creditor exists at the beginning, with reference to the consideration of the conveyance, and continues so that the grantee would have a right to call upon the grantor to supply any deficiency that might arise in the case of foreclosure, the transaction is a conditional sale.⁵ The rights of the parties must be reciprocal.⁶

¹ *Wilcox v. Bates*, 26 Wis. 465; *Ragan v. Simpson*, 27 Wis. 355; *Musgat v. Pumpelly*, 46 Wis. 660; *Starks v. Redfield*, 52 Wis. 349; *Wilson v. Giddings*, 28 Ohio St. 554; *Pearson v. Seay*, 38 Ala. 643; *Blodgett v. Blodgett*, 48 Vt. 32; *Gifford v. Ford*, 5 Vt. 532; *Murphy v. Calley*, 1 Allen (Mass.) 107; *Eaton v. Green*, 22 Pick. (Mass.) 526; *Rice v. Rice*, 4 Pick. (Mass.) 349; *Cooper v. Brock*, 41 Mich. 488; *Cornell v. Hall*, 22 Mich. 377; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323; *Russell v. Southard*, 12 How. (U. S.) 139; *Carr v. Carr*, 52 N. Y. 251; *Horn v. Keteltas*, 46 N. Y. 605; *Murray v. Walker*, 31 N. Y. 399; *Roach v. Cosine*, 9 Wend. (N. Y.) 227; *Clark v. Henry*, 2 Cow. (N. Y.) 324.

² *Russell v. Southard*, 12 How. (U. S.) 139.

³ *Horn v. Keteltas*, 46 N. Y. 605.

⁴ *Glover v. Payn*, 19 Wend. (N. Y.) 518; *Sutphen v. Cushman*, 35 Ill. 186; *Henley v. Hotaling*, 41 Cal. 22; *Musgat v. Pumpelly*, 46 Wis. 660.

⁵ *Robinson v. Cropsey*, 2 Edw. Ch. (N. Y.) 138; *Saxton v. Hitchcock*, 47 Barb. (N. Y.) 220; *Slowey v. McMurray*, 27 Mo. 113; *Hoopes v. Bailey*, 28 Miss. 328; *Johnson v. Clark*, 5 Ark. 321; *Blakemore v. Byrnside*, 7 Ark. 509.

⁶ *Williams v. Owens*, 10 Sim. 386; *Davis v. Thomas*, 1 Rus. & M. 506; *Shaw v. Jeffery*, 13 Moore P. C. 432; *Alderson v. White*, 2 De G. & J. 97.

Generally, the difficulty of discriminating between mortgages and conditional sales grows out of the fact that either through a mistake or misapprehension of the law by one or both parties to the instrument, or a design on the part of one or both to conceal the real purpose of the transaction, it is often found to be mixed and confused, and hence containing some of the incidents of a mortgage, and also of a conditional sale.¹

To solve this question, courts have generally held the transaction to be a mortgage in all doubtful cases, because the ends of justice are the more apt to be attained, and fraud and oppression more likely to be prevented, by such construction.² It would seem that the precise language in the instrument is not always conclusive. Courts of equity decide according to the real nature of the transaction, as shown by all the evidence and circumstances in each particular case, including the relative situation, and the precedent, accompanying, and subsequent acts of the parties.

§ 26. **Equitable Rule of Construction.**—In cases of doubt whether a transaction is a conditional sale or mortgage, equity will hold it to be a mortgage, as by so doing, the rights of the parties are preserved. The mortgagor is permitted, upon fulfillment of his contract, to save his property, and the mortgagee receives his just dues.³ And if a conveyance resolved itself into a security, whatever be its form, it is in equity a mortgage.⁴ It is a general statement that the courts of equity lean against construing a contract to be a conditional sale, and therefore, unless the construction clearly make it of that nature, it is always construed to be a mortgage. The *onus probandi* then is on the defendant to establish it to be a conditional sale. If it be doubtful, then it must be construed

¹Rockwell v. Humphrey, 57 Wis. 410.

²Russell v. Southard, 12 How. (U. S.) 139; Edrington v. Harper, 3 Marsh J. J. (Ky.) 377; Hughes v. Sheaff, 19 Iowa 343; Cornell v. Hall, 22 Mich. 377; Rich v. Doane, 35 Vt. 125.

³Pioneer Min. Co. v. Baker (Cal.), 23 Fed. Rep. 258.

⁴Roddy v. Brick, 42 N. J. Eq. 218.

to be a mortgage.¹ Thus, in a foreclosure suit, where it is doubtful whether the plaintiff's rights are those of a mortgagee or of a legal owner, a contract to convey to defendant, on payment of a certain sum, will be construed to be a mortgage.² The reason of this construction is this: In the case of a mortgage, the mortgagor, although he has not strictly complied with his contract, still has his right of redemption; but in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited.³

§ 27. **Parol Evidence.**—A written agreement appearing upon its face to be clearly a mortgage or a conditional sale, cannot be varied by parol evidence, nor its character changed. But if the intention of the parties cannot be arrived at from the contents of the writing, then parol evidence must be resorted to in order to determine its character.

If it appears from the instrument itself, together with such other evidence as may be adduced, that it is the intention of the parties to make a contract of sale, it will be enforced according to its terms. If the face of the paper shows clearly a mortgage, no parol evidence will be admitted to vary its terms.

This rule is also recognized where the written instrument clearly expresses the intention of the parties to make a conditional sale, though this rule may not have been universally followed. If the true intention and meaning of the parties cannot be arrived at from the face of the writing itself, then parol evidence may determine the question.⁴

¹ *Flagg v. Mann*, 2 Sum. C. C. 535; *Longuet v. Scawan*, 1 Ves. Sr. 406.

² *Rogers v. Burrus*, 53 Wis. 530; *Niggeler v. Maurin*, 34 Minn. 118; *Matthews v. Sheehan*, 69 N. Y. 585; *Lock v. Palmer*, 26 Ala. 312; *Horn v. Keteltas*, 46 N. Y. 605; *Brown v. Dewey*, 2 Barb. (N. Y.) 28.

³ *Glover v. Payn*, 19 Wend. (N. Y.) 578; *Conway v. Alexander*, 7 Cranch (U. S.) 218; *Edrington v. Harper*, 3 Marsh. J. J. (Ky.) 354; *Floyer v. Lavington*, 1 P. Wms. 268; *Chapman v. Turner*, 1 Coll. 280; *Wharf v. Howell*, 5 Binn. (Pa.) 499; *Watson v. James*, 15 La. Ann. 386; *Scott v. Britton*, 2 Yerg. (Tenn.) 215.

⁴ *Hubby v. Harris*, 68 Tex. 91.

ARTICLE V.—TITLE CONVEYED.

- 28. General Rule.
- 29. Distinguished from a Lien.
- 30. Illustrations.
- 31. Common-Law Rule.
- 32. Exceptions to the Common-Law Rule.
- 33. New Jersey Rule.
- 34. Maryland Rule.

§ 28. **General Rule.**—In most States, in case of a chattel mortgage, the property is conditionally conveyed, and if the condition be broken, or not performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of lands.¹

§ 29. **Distinguished from a Lien.**—Under the common-law rule, the mortgage conveys a title instead of creating only a lien. Thus, in Alabama, a debtor executed two mortgages on his chattels, which were duly recorded. Afterwards he temporarily took some of the chattels into Georgia. These chattels being attached for a debt owing by the mortgagor, it was held that the chattel mortgage in Alabama conveyed a title, as distinguished from a lien, which was valid against attaching creditors.²

§ 30. **Illustrations.**—A delivery of a chattel by the debtor to his creditor, accompanied by the execution of an instrument by which the debtor agrees to give up all claim to the chattel, if all claims due the creditor are not paid by a certain time, makes the transaction a mortgage, and the title passes absolutely at law on the failure of the condition expressed in the instrument.³

A written instrument by a stockholder in a private corporation transfers and assigns to the transferee his interest as security for a debt, and empowers the transferee and his assigns to sell and convey such goods, so as to satisfy and dis-

¹Barrow v. Paxton, 5 Johns. (N. Y.) 258; Strong v. Tompkins, 8 Johns. (N. Y.) 97.

²Peterson v. Kaigler, 78 Ga. 464.

³Bunacleugh v. Poolman, 3 Daly (N. Y.) 236.

charge the debt at maturity. This is a chattel mortgage passing the legal title, as between the parties, without any transfer of the certificate of stock on the books of the corporation, and the power of sale is not limited to the sale for the full amount of the debt.¹

Chattel mortgages, when they give the mortgagee the right of immediate possession of the goods, vest in him the title sufficient to maintain trespass against a third party who wrongfully takes the chattels away.²

§ 31. **Common-Law Rule.**—Under the common law, if the condition of the conveyance is not fulfilled, the title becomes absolute in the mortgagee.³ It regarded a mortgage as an absolute sale of the property mortgaged, to be defeated upon the performance of the condition. This doctrine applied to real estate and chattel mortgages. The equitable interposition of the English Chancery early changed the rule in regard to real property, and it soon became settled law that real-estate mortgages were mere securities, and that there could be no sales of mortgaged real estate by the mortgagee without foreclosure. In regard to chattels, this idea of absolute sale upon condition subsequent has a firmer hold. But, at the present time, it is the general rule that the mortgagor of chattels may have the right of redemption, if he redeems in a reasonable time.

This rule of absolute sale with defeasance, recognizes that the mortgagor has an equitable right or interest in property

¹Campbell v. Woodstock Iron Co., 83 Ala. 351.

²Ferguson v. Thomas, 26 Me. 499; Stewart v. Hanson, 35 Me. 506; Case v. Winship, 4 Blackf. (Ind.) 425; Woodruff v. Halsey, 8 Pick. (Mass.) 333; Pettes v. Kellogg, 7 Cush. (Mass.) 456; Cotton v. Marsh, 3 Wis. 221; Welch v. Sackett, 12 Wis. 243.

³Mervine v. White, 50 Ala. 388; Wright v. Ross, 36 Cal. 414; Simmons v. Jenkins, 76 Ill. 479; Bean v. Borney, 10 Iowa 498; Brown v. Phillips, 3 Bush (Ky.) 656; Winchester v. Ball, 54 Me. 558; Landon v. Emmons, 97 Mass. 37; Fletcher v. Newdeck, 30 Minn. 125; Volney Stamp v. Gilman, 43 Miss. 456; Bowers v. Benson, 57 Mo. 26; Tompkins v. Bates, 11 Nebr. 147; Brown v. Bement, 8 Johns. (N. Y.) 96; Ackley v. Finch, 7 Cow. (N. Y.) 292; Case v. Boughton, 11 Wend. 109; Smith v. Acker, 23 Wend. (N. Y.) 667; Bryant v. Carson River Lum. Co., 3 Nev. 313; Leach v. Kimball, 34 N. H. 568; Bragelman v. Daue, 69 N. Y. 69; Williams v. Dobson, 26 S. Car. 110; Blodgett v. Blodgett, 48 Vt. 32; Musgat v. Pumpelly, 46 Wis. 699; Freeman v. Freeman, 17 N. J. Eq. 44.

of which he may avail himself by paying the debt due and thus redeeming the property; and as long as the right of redemption remains in the mortgagor, it may be said, viewing the subject from an equitable standpoint, that the title of the mortgagee is not to every intent absolute. In mortgages of personal property there exists, after condition broken, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his suit to redeem within a reasonable time.¹

But the mortgagee can, after due notice, sell the personal property mortgaged, as he could under the civil law, and the title, if the sale be *bona fide* made, will vest absolutely in the vendee, and the right to redemption cut off.²

§ 32. **Exceptions to the Common-Law Rule.**—In Washington, no title passes to the mortgagee except by foreclosure and sale.³ The same doctrine was held in Oregon.⁴ Dakota adopts this rule by statute.⁵

In Michigan, no legal title is transferred until foreclosure and sale or something equivalent thereto.⁶

§ 33. **New Jersey Rule.**—In this State, a chattel mortgage is regarded as a mere security for a debt, and does not divest the property of the mortgagor, yet after condition broken the title becomes absolute in the mortgagee.⁷

§ 34. **Maryland Rule.**—Under the Code⁸ a legal chattel mortgage has the same effect in transferring title, though the mortgagor remains in possession, as if the mortgagee had been in possession of the mortgaged property, and the title to the offspring of animals included in such mortgage is in the mortgagee.⁹

¹ Westbrooke v. Kemp, 1 Ves. 278.

² 2 Story's Eq. § 1081; Mauge v. Heringhi, 26 Cal. 577.

³ Byrd v. Forbes, 3 Wash. St. 318.

⁴ Chapman v. State, 5 Oreg. 432; overruled by Case v. Campbell, 14 Oreg. 460.

⁵ Comp. Laws, §§ 4330, 4331; Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co., 43 N. W. Rep. 806.

⁶ Kohl v. Lynn, 34 Mich. 360.

⁷ Woodside v. Adams, 40 N. J. L. 417.

⁸ Art. 24, §§ 29, 30.

⁹ Cahoon v. Wiers, 67 Md. 573.

ARTICLE VI.—AN ABSOLUTE SALE.

- 35. Definition and Distinction.
- 36. Bill of Sale as a Mortgage.
- 37. Sale with Terms of Defeasance.
- 38. A Bill of Sale and Lease.
- 39. Will be Treated as a Mortgage only Between the Parties.
- 40. Estoppel.
- 41. In Equity—Parol Evidence.
- 42. At Law—Parol Evidence.
- 43. When the General Rule Does Not Apply.

§ 35. **Definition and Distinction.**—A sale is a transfer of the absolute or general property in a thing for a price in money.¹

When property passes between parties, and there is no obligation to return the specific article, and the receiver is at liberty to return another thing, and of equal value, he becomes debtor to make the return, and the title to the property is changed—this is a sale absolute.² If, at the time of the sale, an agreement is made to reconvey the chattels to the vendor, on payment of a loan, the transaction, as between the parties, will be construed as a mortgage.³ But when there is made an absolute bill of sale, and a bond to reconvey upon payment of a certain sum at a given day, otherwise the bond to be void, in the absence of some proof of a loan of money or forbearance, it constitutes a conditional sale.⁴ If an absolute bill of sale is taken as security, it is a chattel mortgage.⁵ A bill of sale will not be construed as a mortgage unless the proof is clear that such was the design. Thus, a bill of sale was made to a newspaper, and as to whether it was a mortgage, the manager of the paper was called as a

¹ *Wittowsky v. Wasson*, 71 N. Car. 451.

² *Loneragan v. Stewart*, 55 Ill. 45; *Powder Co. v. Burkhardt*, 97 U. S. 110; *Dittmar v. Norman*, 118 Mass. 319; *Rahilly v. Wilson*, 3 Dill. C. C. 420; *Frazer v. Bass*, 66 Ind. 1; *Nelson v. Brown*, 44 Iowa 455; *Hughes v. Stanley*, 45 Iowa 622; *Schlesiger v. Stratton*, 9 R. I. 578; *Marsh v. Titus*, 3 Hun (N. Y.) 550; *Johnston v. Browne*, 37 Iowa 200.

³ *Polhemus v. Trainer*, 30 Cal. 685; *Carpenter v. Snelling*, 97 Mass. 452; *Lobban v. Garnett*, 9 Dana (Ky.) 389; *Davis v. Hubbard*, 38 Ala. 185.

⁴ *Thompson v. Chumney*, 8 Tex. 389.

⁵ *Butts v. Privett*, 36 Kans. 711.

witness. He testified that he, after the sale, continued to be the manager, and always regarded the vendor as the owner of the paper; that the vendor furnished him some money to run the paper after the transfer. But it was shown that this witness had admitted to other parties that the vendee owned the paper. The testimony of the parties to the transaction was contradictory—the one contradicting the other. Such evidence was not sufficient to justify a court in holding the bill of sale to be a mortgage.¹

A bill of sale of a canal boat was executed to judgment creditors, who held separate judgments against the owner. In ascertaining the nature of this instrument, one of the creditors testified that he took a bill of sale to secure the payment of the judgment; that he thought that if he should not succeed in getting his pay or its value, he should still hold his judgment; that they bought the boat to secure their judgments—to get their pay. The other creditor testified that the reason why he did not satisfy his judgment when he received a bill of sale, was because he had not got anything yet; that as soon as he was paid what he had expended for the judgment debtor, he would be willing to satisfy it at any time. Under these circumstances, the bill of sale was construed as a mortgage.² So, an absolute bill of sale of corporation stock, given to secure a loan by the purchaser, is a mortgage.³

In Alabama, an instrument by which a stockholder in a corporation transfers and assigns his stock therein as security for a debt, and authorizes his assignee to sell and transfer said stock, so as to satisfy and discharge said debt at maturity, is a mortgage, which passes the title as between the parties without any transfer of the stock on the books of the company, and the power to sell is not implied to sell for the full amount of the debt.⁴

¹ *Cochrane v. Price* (Md.), 8 At. Rep. 361. See 66 Md. p. XIV.

² *Keller v. Paine*, 107 N. Y. 83.

³ *Cake v. Shull*, 45 N. J. Eq. 208.

⁴ *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

The surrender by a vendor of certain goods to a purchaser, on the execution of a bill of sale, is not conclusive that the transaction was a sale and not a mortgage.¹

A bill of sale delivered as security for money borrowed, the lender supposing that the bill satisfied a mortgage, does not amount to a mortgage, nor render valid a mortgage substituted therefor, which would otherwise be void, under Pub. Stat. of Massachusetts, ch. 159, § 98, declaring void all conveyances made by an insolvent within six months before the commencement of the proceeding in insolvency.² A note given in part payment of the price of chattels, providing that the title shall remain in the vendor until the note is paid, with the right, on default, to take possession of the property without refunding any money previously paid on the account of said purchase, is a contract for an absolute sale and mortgage back to secure the agreed price.³

A creditor agreed with a debtor who owed him \$980.79 to take a chattel mortgage of property worth about \$2,500, to secure a debt, and advanced \$600 to secure other indebtedness amounting to \$619.21, and to pay any surplus that might remain, to the debtor; the creditor could sell the property on credit, but was to account for such sale as cash, and to have \$200 for his services. Property worth \$200 was left in the creditor's hands. This transaction was a valid mortgage and not a general assignment.⁴

In general, an instrument absolute on its face as a bill of sale, and stating that the vendor is to retain possession of the property therein described for a certain time, during which time, if an indebtedness is paid, the conveyance shall be null and void, is in effect a chattel mortgage.⁵ A bill of sale, absolute upon its face, transferring property to be held as security for the payment of a debt due the vendee, is, in

¹ *Buhl Iron Works v. Trenton*, 67 Mich. 623.

² *Copeland v. Barnes*, 147 Mass. 388.

³ *Baldwin v. Crow*, 86 Ky. 679.

⁴ *Browne v. Guthrie*, 110 N. Y. 485.

⁵ *Blake v. Corbett*, 120 N. Y. 327.

character and effect, a mortgage, and is to be treated as such.¹

The instrument must be treated as a chattel mortgage whenever the transaction is a present transfer of the title of the property conveyed, subject to be defeated on payment of the sum or instrument it is given to secure, and in the default of performance by the vendor of the condition, the title of the vendee becomes absolute.² Thus, when a debtor in failing circumstances conveys his property, both real and personal, to a creditor, who assumed and paid the other debts, and then carried on the business, the debtor acting as his agent, under an arrangement by which he was to take out of the proceeds enough money for his personal expenses, and pay the residue to such creditor, and when the latter had received the full amount of his advances, and interest, the property was to be reconveyed to the debtor, this transaction was a mortgage.³

§ 36. **Bill of Sale as a Mortgage.**—A bill of sale, absolute upon its face, will be treated as a chattel mortgage if it can be shown that it was intended for security for money loaned or to be loaned.⁴ An absolute bill of sale, executed to secure a debt, operates as a mortgage, but will be postponed to a subsequent recorded mortgage,⁵ and such mortgage may be foreclosed.⁶ And even if the bill of sale purports on its face to be made for a money consideration, and without condition, it may be shown to be a mortgage;⁷ being given as a mere security for the payment of money, it is in legal effect a chattel mortgage.⁸

§ 37. **Sale with Terms of Defeasance.**—Where an absolute

¹ *Smith v. Beattie*, 31 N. Y. 542.

² *McCaffrey v. Woodin*, 65 N. Y. 465.

³ *Whittemore v. Fisher*, 132 Ill. 243. See, also, *Horn v. Reitler*, 12 Colo. 310; *Lessing v. Grimland*, 74 Tex. 239.

⁴ *Ing v. Brown*, 8 Md. Ch. 521.

⁵ *Rogers v. Vaughn*, 31 Ark. 62; *Scott v. Henry*, 8 Eng. (Ark.) 112.

⁶ *Frost v. Allen*, 57 Ga. 326.

⁷ *Laeber v. Langhor*, 45 Md. 477.

⁸ *Plummer v. Shirley*, 16 Ind. 380. See *Blodgett v. Blodgett*, 48 Vt. 32.

bill of sale is made, and, contemporaneously, the vendee gives back an instrument of defeasance, the transaction will be construed as a mortgage, if it can be consistently done,¹ even if accompanied by a verbal defeasance.² A writing, making, in the first place, an absolute conveyance of a horse, and then containing a condition that the instrument shall be void upon payment by the vendor to the vendee a certain sum of money, is in law a mortgage.³

If an absolute deed is made of a chattel, and a defeasance made at the same time, but separate from it, it should not operate as a mortgage to the prejudice of third persons.⁴

An instrument by which a debtor, for the purpose of securing a debt, conveys personal property to his creditor, giving him the possession thereto with authority to sell the same and account to the debtor for the surplus after paying the debt so secured, will be treated as a chattel mortgage as well between the grantee and the creditors of the mortgagor as between the parties to the transfer.⁵

A bill of sale not executed and recorded as required by statute, given to secure a party as surety, with a defeasance, is a valid chattel mortgage as between the parties.⁶

§ 38. **A Bill of Sale and Lease.**—Where a bill of sale of goods and a lease, absolute on its face, are executed to secure a previous debt, and the vendee stipulates that the vendor shall have a certain time to pay the amount, and retains possession of the goods until such payment, the transaction amounts to a chattel mortgage.⁷ And a bill of sale of chattels and a lease executed contemporaneously by the vendee

¹ *Barnes v. Holcomb*, 12 Sm. & M. (Miss.) 306; *Hopkins v. Thompson*, 2 Port. (Ala.) 433.

² *Omaha v. Sutherland*, 10 Nebr. 334.

³ *McFadden v. Turner*, 3 Jones (N. Car.) 481.

⁴ *Gaither v. Mumford*, 2 Tayl. (N. Car.) 167; *Brown v. Bement*, 8 Johns. (N. Y.) 96.

⁵ *Sloan v. Coburn*, 26 Nebr. 607.

⁶ *Horn v. Reitler*, 12 Colo. 310. See, also, *Russell v. Longmoore* (Nebr.), 45 N. W. Rep. 624; *Blake v. Corbett*, 120 N. Y. 327.

⁷ *Ford v. Ransom*, 39 How. Pr. (N. Y.) 429; *Winslow v. Tarbox*, 6 Shep. (Me.) 132.

to the vendor, whereby the vendor agrees to buy back the property at a fixed price, will be construed as a mortgage.¹

§ 39. **Will be Treated as a Mortgage only Between the Parties.**—It is only between the parties that an absolute bill of sale may be treated as a mortgage. It will not be done to the prejudice of creditors.²

§ 40. **Estoppel.**—A party will not be estopped from showing that a bill of sale, absolute upon its face, was in fact a chattel mortgage, because he admitted, for the purpose of avoiding a continuance of his case, that such instrument was a bill of sale.³

§ 41. **In Equity—Parol Evidence.**—A bill of sale, absolute on its face, may be shown by parol evidence to have been intended only as a mortgage.⁴ The party executing the bill of sale may show, by parol evidence, that the transaction between the parties at the time of the delivery of the written instrument, was a mortgage, and that the agreement was that the possession of the chattels described in the instrument should remain with the mortgagor.⁵

§ 42. **At Law—Parol Evidence.**—When a bill of sale is not in effect a mortgage and contains no defeasance, a defeasance cannot be added by parol evidence. Thus, a maker of a promissory note delivered a quantity of merchandise, together with a receipted bill of parcels in the usual form, to the vendee, who was to retain the goods until the note was liquidated. Such a bill cannot be construed as a mortgage.⁶

¹ *In re Gurney*, 7 Biss. C. C. 414.

² *State v. Bell*, 2 Mo. App. 102; *Gaither v. Mumford*, 2 Tayl. (N. Car.) 167.

³ *National Insurance Co. v. Webster*, 83 Ill. 470.

⁴ *Parish v. Gates*, 29 Ala. 254.

⁵ *Caswell v. Keith*, 12 Gray 351; *Despard v. Walbridge*, 15 N. Y. 374; *Butts v. Privett*, 36 Kans. 711; *More v. Wade*, 8 Kans. 381; *Carter v. Burris*, 10 Sm. & M. (Miss.) 527; *McDonald v. Kellogg*, 30 Kans. 170; *National Ins. Co. v. Webster*, 83 Ill. 470; *Fuller v. Parish*, 3 Mich. 211; *Pierce v. Stevens*, 30 Me. 184; *Ward v. Deering*, 2 Mon. (Ky.) 9; *Coe v. Cassidy*, 72 N. Y. 133; *Laeber v. Langhor*, 45 Md. 477; *Scott v. Henry*, 13 Ark. 112; *Loyd v. Currin*, 3 Humph. (Tenn.) 462; *Hurford v. Horned*, 6 Ore. 362.

⁶ *Whittaker v. Sumner*, 20 Pick. (Mass.) 399.

But when the instrument is a mere bill of parcels, parol evidence is admissible to explain it.¹ A formal bill of sale, absolute on its face and under seal, conveying personal property with covenants of warranty, cannot, in an action at law between the parties to it, be shown to have been given only as collateral security.² It has also been held that parol testimony cannot be received to give the effect of a mortgage to a bill of sale absolute in its terms, though not under seal, but it is admissible to prove that a payment on a bill of sale was not made in cash, and also to show in what manner it was made.³ So, also, it is not competent for a grantee of a deed absolute on its face to show by parol that it was intended to operate only as a mortgage; but such evidence would be admissible for a creditor to assail the bill for fraud.⁴ Neither can it be shown by parol evidence that, at the time of the transaction, there was an oral agreement that an absolute bill of sale should be regarded as a mere bailment of property for a temporary purpose.⁵ A bill of sale which is absolute in its terms cannot be shown to be a mere bailment of personal property for a temporary purpose by pleading that the parties had thus limited the effect of the bill of sale by a contemporaneous oral agreement.⁶

§ 43. **When the General Rule Does Not Apply.**—A bill of sale not under seal, absolute on its face, may be shown, in Michigan, by parol evidence, to have been given as security, and the rule that to prove a deed absolute on its face was intended as a mortgage, the evidence must be clear, convincing and unequivocal, does not apply.

¹ *Hazard v. Loring*, 10 Cush. (Mass.) 267.

² *Harper v. Ross*, 10 Allen (Mass.) 332.

³ *Bryant v. Crosby*, 36 Me. 563.

⁴ *Hartshorn v. Williams*, 31 Ark. 149; *Hogel v. Lindell*, 10 Mo. 483; *Montany v. Rock*, 10 Mo. 506.

⁵ *Allen v. Bryson*, 67 Iowa 591.

⁶ *Peck v. Armstrong*, 38 Barb. (N. Y.) 215; *Forbes v. Waller*, 25 N. Y. 430; *Martin v. Hamlin*, 18 Mich. 354; *Adams v. Wilson*, 12 Metc. (Mass.) 138; *Atherton v. Dearmond*, 33 Iowa 353; *Hurd v. Gallaher*, 14 Iowa 394; *Barker v. Buel*, 5 Cush. (Mass.) 519; *Isett v. Lucas*, 17 Iowa 508; *Gelpeke v. Blake*, 19 Iowa 263. See, also, *Wilber v. Kray*, 73 Tex. 533.

A mere bill of sale, not under seal, is not governed by the rules applicable to such solemn instruments as deeds under seal. It does not require, by any means, the same amount of strictness of proof to declare a mere bill of sale a chattel mortgage or security, as it does to determine a deed to be a mortgage. So, it is competent to show, at the trial, that a bill of sale, although conveying an absolute title on its face, may have been given by way of security, and this by parol evidence.¹

ARTICLE VII.—REQUISITES.

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| 44. Form. | |
| 45. Need Not be Sealed. | |
| 46. Execution. | |
| 47. An Unacknowledged Mortgage—Effect of. | |
| 48. Acknowledgment. | |
| 49. Not Conforming to Statutory Provisions. | |
| 50. When no Specific Form Given. | |
| 51. Missouri Rule. | |
| 52. Notary Public Using a Seal not his Own. | |
| 53. Statutory Provisions as to Form and Execution. | |
| 54. Alabama. | |
| 55. Instance. | 67. Nevada. |
| 56. Arizona Territory. | 68. New Hampshire. |
| 57. California. | 69. Instances. |
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| 60. Georgia. | 72. North Carolina. |
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| 63. Instances. | 75. Utah. |
| 64. Maryland. | 76. Vermont. |
| 65. Montana. | 77. Instances. |
| 66. Instance. | 78. Washington. |

§ 44. **Form.**—A chattel mortgage may be created by a writing which uses the word “mortgage” only, without any other words of conveyance. Neither is it necessary that it shall contain a power of sale, or authorize the mortgagee to take possession on default in the payment of the debt secured. No form of words to constitute a mortgage is prescribed, and no circumlocution defining a contract is more accurate than the word itself.²

¹*Seligman v. Ten Eyck* (Mich.), 42 N. W. Rep. 134. As to a conditional sale, see *Kendrick v. Beard* (Mich.), 45 N. W. Rep. 837.

²*Mervine v. White*, 50 Ala. 388.

To render a chattel mortgage valid as against creditors, there must be a specific condition, on performance of which the property will revert to the mortgagor.¹ A mortgage upon partnership property, to secure a partnership debt, which is signed by two of the partners and assented to by the third, is valid as to the subsequent creditors of the firm, though it does not purport to be the mortgage of the partnership.²

A description of the mortgagees in reciting their name as "Henderson, Echols & Co.," is sufficient without other designating words.³

§ 45. **Need not be Sealed.**—A chattel mortgage need not be under seal,⁴ and as the mortgage of such property of a firm, made by one of the partners to secure a firm debt, is valid, the addition by him of a seal thereto does not invalidate the instrument.⁵ A sealed mortgage of chattels may be waived or modified by a subsequent parol agreement.⁶ Even informalities in the attestation or execution of a mortgage created by verbal contract and reduced to writing, do not invalidate it.⁷

§ 46. **Execution.**—The date of a mortgage is supposed to be the time of its execution. The date of acknowledging the recording tends also to establish the time of execution.⁸ A mortgage on personalty is valid between the parties, irrespective of any defects in the attestation or probate, its execution and delivery being duly proved at the trial.⁹ Thus, a mortgage was not duly probated, so as to prepare it for admission to record, but this was no objection to its

¹ *Fairfield Bridge Co. v. Nye*, 60 Me. 372.

² *Bank v. Johnson*, 79 Iowa 290.

³ *Henderson v. Gates*, 52 Ark. 371.

⁴ *Gibson v. Warden*, 14 Wall. (U. S.) 24; *Hawkins v. Hastings Bank*, 1 Dill. C. C. 462; 4 Bank. Reg. 108; *Milton v. Mosher*, 7 Metc. (Mass.) 244; *Gerry v. White*, 47 Me. 504; *Sweetzer v. Mead*, 5 Mich. 107; *Despatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 205.

⁵ *Milton v. Mosher*, 7 Metc. (Mass.) 244.

⁶ *Acker v. Bender*, 33 Ala. 230.

⁷ *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514.

⁸ *Merrill v. Dawson*, 1 Hemp. C. C. 563.

⁹ *Smith v. Camp* (Ga.), 10 S. E. Rep. 539.

validity as between the parties. At the trial the execution and delivery were proved. Being thus proved, it matters not how defectively it was attested on its execution.¹

§ 47. **Unacknowledged Mortgage.**—A mortgage which is not acknowledged according to law, although it may be obligatory upon the parties to it, is void as to creditors and subsequent purchasers in good faith.²

But if the mortgagee takes possession of the chattels the mortgage will be good.³

A certificate, "personally appeared A. P. and N. P., his wife, acknowledged," &c., shows an acknowledgment by husband and wife.⁴

§ 48. **Acknowledgment.**—A chattel mortgage made upon good consideration, although it has not been acknowledged according to statute, is good against the mortgagor and any one claiming under him by virtue of a void conveyance.⁵ If the mortgagee takes possession of the property before any intervening rights arise, the mortgage will be good, regardless of any acknowledgment.⁶ An acknowledgment of a chattel mortgage taken and certified to by a party beneficially interested in it is void, and does not authorize record of the instrument; nor does such record, if made, give any legal notice to third parties.⁷

A substantial compliance with the statutes governing the acknowledgment or proof of the execution of instruments for

¹ *Gardner v. Moore*, 51 Ga. 268; *Marable v. Mayer*, 78 Ga. 60.

² *McDowell v. Stewart*, 83 Ill. 558; *Selking v. Hebul*, 1 Mo. App. 340; *Machette v. Wanless*, 2 Colo. 169.

³ *Chipron v. Fickert*, 68 Ill. 284.

⁴ *Brown v. Corbin*, 121 Ind. 455.

⁵ *Machette v. Wanless*, 2 Colo. 169. Under the Revised Statutes, p. 103, and the Laws of 1874, p. 196, that a chattel mortgage must be acknowledged before a justice in whose district the mortgagor may reside, a non-resident person, natural or artificial, cannot execute a valid chattel mortgage in this State. *Cook v. Hagor*, 3 Colo. 386.

⁶ *Chipron v. Fickert*, 68 Ill. 284. In Illinois, a chattel mortgage may be acknowledged before a police magistrate of a village, by a resident of the township in which the village is situated. *Ticknor v. McClelland*, 84 Ill. 471; *Herkelrath v. Stookey*, 58 Ill. 11; *Nelson v. Kessinger*, 16 Ill. App. 185.

⁷ *Wilson v. Traer*, 20 Iowa 231; *Hammers v. Dole*, 61 Ill. 307; *Beaman v. Whitney*, 20 Me. 413; *Nichols v. Hampton*, 46 Ga. 253.

the purpose of having them recorded is sufficient. An acknowledgment made in Florida by the makers of a chattel mortgage of "the foregoing instrument by them signed, to be their free act," such instrument also affirming upon its face, by the attestation clause, to have been "delivered," is a sufficient acknowledgment of both the signing and delivering to entitle such instrument to be recorded. Judge Raney says: "The particular objection made to the record in the case before us is that the certificate does not show an acknowledgment of the execution of the instrument, *i. e.* of both the signing and delivery thereof, but only of the signing. It seems to us that an acknowledgment by the makers of an instrument as their 'free act,' cannot reasonably be held to be an acknowledgment of less than that which the instrument purports, upon its face, to be. This instrument purports upon its face to have been signed by the mortgagors, and likewise, by the attestation clause, to have been delivered in the presence of the subscribing witnesses; and when the acknowledgment was made, the parties making must, in the absence from this certificate of anything to the contrary, be understood to have meant as well that it had been delivered, as stated upon its face, as that it had been signed. The language 'the foregoing instrument by them signed' is all descriptive of the instrument acknowledged; The words 'by them signed' are only a part of such description, and were not intended to limit the effect of the instrument or the acknowledgment of it." This is a substantial compliance with the statutes and is a valid acknowledgment.¹

A substantial compliance with the statutes is sufficient; it is not necessary to use the identical words. If an acknowledgment can reasonably be construed as valid it should be done, *ut res magis valeat quam pereat*—it should be the aim to preserve, and not to destroy.²

Where a certificate of acknowledgment is duly signed by a notary public, and his notarial seal is impressed upon the

¹ *Einstein v. Shouse*, 24 Fla. 490.

² *Henderson v. Grewell*, 8 Cal. 581; *Kelly v. Calhoun*, 95 U. S. 710.

same paper, though "on the opposite side and end thereof," and there is but one certificate to which the seal could be made applicable, there is a sufficient authentication.¹

A mortgage of partnership property executed by a member of the firm and acknowledged by him, is sufficient, in the absence of any statutory requirement as to acknowledgment of mortgages on partnership property by a member of a firm.²

A certificate of acknowledgment, that the mortgage was duly acknowledged before the justice by the above-named C. D., the mortgagor, giving the date, but omitting the words "and entered by me," according to the Illinois law, is not open to any substantial objection. It is sufficient if, in fact, the justice has made the entry on his docket as required by law.³ In Illinois, actual notice of chattel mortgages will not supply the place of acknowledgment or record against subsequent purchasers or incumbrancers.⁴

§ 49. **Not Conforming to Statutory Provisions.**—Whenever there are statutory provisions as to acknowledgments of chattel mortgages, they must be complied with before registration, to be notice to third parties. Thus, in Illinois, a mortgage not acknowledged in conformity with the statute, though recorded, is no notice to creditors or purchasers.⁵ So, a false certificate does not make the mortgage valid as to third parties.⁶ So, where the statute requires the acknowledgment to be entered upon the justice's docket, failing to do this, it is not notice to third parties.⁷

So, when a chattel mortgage is required to be acknowledged before a justice of the peace, it must be done; in such case, a chattel mortgage acknowledged before a

¹ *Evans v. Smith*, 43 Minn. 59.

² *Citizens Bank v. Johnson*, 79 Iowa 290.

³ *Harvey v. Dunn*, 89 Ill. 585.

⁴ *People v. Hamilton*, 17 Ill. App. 599.

⁵ *Frank v. Miner*, 50 Ill. 444; *Selking v. Hebel*, 1 Mo. App. 340.

⁶ *McDowell v. Stewart*, 83 Ill. 538.

⁷ *Koplin v. Anderson*, 88 Ill. 120; *Frank v. Miner*, 50 Ill. 444; *Porter v. Dement*, 35 Ill. 478.

notary public in the form appropriate to mortgages of realty is void.¹

§ 50. **When No Specific Form Given.**—Where the statute prescribes no form for a certificate of acknowledgment of a chattel mortgage, it is sufficient if it fairly affirms that the person executing the mortgage appeared in person before the officer and acknowledged the mortgage as his act and deed.²

§ 51. **Missouri Rule.**—Under the statute,³ if a chattel mortgage is acknowledged before a justice of the peace, it must be before a justice residing in the county where the chattels are situated.⁴

§ 52. **Notary Public Using a Seal Not His Own.**—The fact that a notary public in a certificate of acknowledgment to a chattel mortgage uses a plain notarial seal not his own, and differing somewhat from the one ordinarily used by him, does not, in Indiana, affect the validity of the instrument, nor render its recording illegal.⁵

§ 53. **Statutory Provisions as to Form and Execution.**—Some of the States give a form of chattel mortgages, and state what is necessary to the execution of a chattel mortgage. In many of the States an affidavit of execution, stating the amount of the indebtedness, must accompany the mortgage. According to the line of authorities as to the affidavit, the only conclusion to be arrived at is that such a particularly-important feature of the affidavit should be stated with great strictness and accuracy, leaving nothing to inference, vagueness or ambiguity. The authorities agree on the point that affidavits of *bona fides* and of execution should be accurate, complete and unambiguous. But the decisions differ somewhat as to what should be considered a sufficient variation or omission to render the instrument void as against the execution creditors.

¹ Long v. Cockern, 128 Ill. 29.

² Brunswick, &c., v. Brackett, 37 Minn. 58.

³ Rev. Stat. §§ 676, 2503.

⁴ McDaniel v. Harris, 27 Mo. App. 547.

⁵ Muncie Nat. Bank v. Brown, 112 Ind. 474.

§ 54. **Alabama.**—In this State, all chattel mortgages are invalid which are not in writing and subscribed by the mortgagor. This is provided by statutory enactment.¹

§ 55. **Instance.**—A vendor delivered to another certain goods, taking in return notes, with a written agreement that the title to the goods should remain in the former until they were paid for. The vendee could sell the goods and take notes, and turn them over to the vendor as security; if any of the original notes remained unpaid ten days after due, the vendor could take the goods, the goods returned to be credited on the notes unpaid. It was held that this transaction was a mortgage. Under the Statute 1886, § 1731, providing that mortgages of chattels are not valid unless in writing, the vendor cannot, on an oral mortgage, recover in trover against the purchaser from the mortgagor.²

§ 56. **Arizona Territory.**—No chattel mortgage is valid, except between the parties thereto, unless it shall be made, executed and recorded according to the provisions of the statute. If the mortgagee takes possession, the mortgage need not be recorded. The mortgage must contain the sum to be secured, the rate of interest, when and where made and payable, and the residence of the parties. The parties thereto must make an affidavit that the mortgage is *bona fide*, and without any design to perpetrate a fraud. This affidavit must be attached to the mortgage.³

§ 57. **California.**—The mortgage must be accompanied by an affidavit that the mortgage is made in good faith and without any design to defraud, hinder or delay creditors; this affidavit must be made by the parties thereto.⁴ And a mortgage can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant of real property.⁵

¹ Laws of 1886, § 1731.

² Dowdell v. Empire Lumber Co., 84 Ala. 316.

³ Gen. Laws, § 3644.

⁴ Civil Code, § 2957.

⁵ Civil Code, § 2922.

§ 58. **Dakota.**—A chattel mortgage can be created, renewed or executed only by writing, subscribed by the mortgagor, and must be signed in the presence of two persons, who must then sign in the mortgagor's presence.¹

§ 59. **Delaware.**—No mortgage is valid unless there be indorsed upon or annexed to it, and recorded with it, an affidavit that the mortgage was made *bona fide* for securing a debt, and not for delaying or defrauding creditors.²

§ 60. **Georgia.**—A chattel mortgage must be executed in the presence of, and attested by, or proved before, a notary public, or justice of any court in the State, or any clerk of the Superior Court.³

§ 61. **Idaho.**—The mortgage must state the residence of the parties thereto, the sum secured, the rate of interest to be paid, and the mortgage must be accompanied by an affidavit that the mortgage was made *bona fide*, and not to delay, defraud or hinder creditors.⁴

§ 62. **Illinois.**—The acknowledgment must be made by the mortgagor before a justice of the peace of the town or precinct where the mortgagor resides; or if there be no acting justice of the peace in the town or precinct where the mortgagor resides, or if the mortgagor is a non-resident at the time of the acknowledgment, then before any officer authorized to take acknowledgments of deeds. If the acknowledgment is by a resident of the State, a justice of the peace, or county judge, shall enter in his docket a memorandum thereof, substantially as follows:

A. B. [name of mortgagor] to C. D. [name of mortgagee]; mortgage of [here insert description of the property as in the mortgage].

Acknowledged this — day of —, 189—. ⁵

¹ Civil Code, § 1749.

² Gen. Laws, vol. 15, ch. 477, § 3.

³ Code, § 1935.

⁴ Com. Laws, p. 661, § 1.

⁵ 2 Star. & Curtis Stat. ch. 95, §§ 2, 3.

§ 63. **Instances.**—Failure to make such entry invalidates mortgages as to other lien-holders or subsequent purchasers.¹

A police magistrate may take the acknowledgments.²

§ 64. **Maryland.**—To be valid against third persons, the mortgagee, or his agent (who must make the affidavit “that he is agent of the mortgagee”), must make affidavit, which must be indorsed on the mortgage, and recorded therewith, that the consideration is true and *bona fide* as therein set forth. The affidavit can be made before any one authorized to take acknowledgments of deeds.³

§ 65. **Montana.**—The mortgage must be accompanied by an affidavit, made by the parties, that the mortgage was made in good faith and not to delay, hinder or defraud creditors; or, in case of their absence, by their attorney.⁴

§ 66. **Instances.**—An affidavit, sworn to by an agent of the mortgagee, not setting forth his absence, is void as to third persons. A mortgage of a stock of goods, providing that the mortgagor may sell in the usual course of business, is void. When the parties are absent, the affidavit must set forth the fact of their absence or it will be void as to third persons; but this objection cannot be considered on a motion for judgment on the pleadings when the question of possession is not disputed and undetermined.⁵

§ 67. **Nevada.**—To the mortgage must be attached or annexed the affidavit of the parties thereto, or some other person in their behalf, setting forth that the mortgage is made in good faith, and given for a debt actually owing to the mortgagee, stating the amount and character of such debt, and that the same is not made or received with intent to hinder, delay or defraud any creditor of the mortgagor,

¹Koplin v. Anderson, 88 Ill. 120.

²Ticknor v. McClelland, 84 Ill. 471; Herkelreth v. Stookey, 58 Ill. 11; Nelson v. Kessinger, 16 Ill. App. 185.

³Rev. Code, art. 44, § 54.

⁴Com. Stat. § 1538.

⁵Leopold v. Silverman, 7 Mont. 266.

providing that no chattel mortgage shall be given or be valid for a less sum than \$100.¹

§ 68. **New Hampshire.**—No chattel mortgage is valid, save as between the parties, unless both of the parties make an affidavit on the mortgage, which must be recorded therewith, as follows :

“ We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt, honestly due and owing from the mortgagor to the mortgagee. So help us God.”

When a firm is a party, any partner may make and subscribe the affidavit ; and when a corporation is a party, that may be done by a director or any authorized person. If the mortgage is given for any other purpose than to secure a debt due from the mortgagor to the mortgagee, the agreement or liability must be specifically set out in the mortgage, and the affidavit made to conform thereto.²

§ 69. **Instances.**—A chattel mortgage to secure a debt due a town is valid, when the necessary affidavit is made and subscribed by one of the selectmen in behalf of the town.³ A chattel mortgage made to secure a liability assumed by the mortgagee for the mortgagor, is invalid as against creditors of the latter, if the liability is not truly and specifically stated in the condition, or if this validity, truth and justice are not verified by the affidavit.⁴

The writing of the names of both parties in the body of the chattel mortgage is not a compliance with the statute which requires that the parties shall make and subscribe the affidavit.⁵

¹ Laws of 1885, ch. 54.

² Gen. Laws, ch. 137, §§ 6-11.

³ Sumner v. Dalton, 58 N. H. 295.

⁴ Phillips v. Johnson, 64 N. H. 393 ; Gen. Laws, ch. 137, §§ 6, 9, 11.

⁵ Stone v. Marvel, 45 N. H. 481.

But a chattel mortgage without the affidavit required by the statute, is valid against one having notice that it was made in good faith and for a valuable consideration.¹

If there be any material defect in taking of the oath, such as the omission of the officer to sign the certificate, it is ineffectual.²

Where, in a case of a personal-property mortgage, it appears by the justice's certificate that the affidavit required by statute was sworn to only by the mortgagor, it was held that the record was not constructive notice, and that the mortgage was ineffectual against subsequent purchasers.³ But a chattel mortgage is valid between the parties as to articles inserted in it by them after its execution, though no new affidavit is made. Thus, where the mortgage, as originally executed and recorded, was changed by the insertion of words descriptive of the property, it becomes a new mortgage as to those chattels, if not as to all the chattels, and valid between the parties, although no new affidavit was made and subscribed or appended to the mortgage and recorded therewith.⁴

§ 70. **New Jersey.**—An affidavit or affirmation must be made and subscribed by the holder or holders of said chattel mortgage, or his agent or attorney, stating the consideration of said mortgage, and, as nearly as possible, the amount due and to grow due thereon. This affidavit must be annexed to the mortgage.⁵

§ 71. **Instances.**—If the affidavit is omitted, the mortgage is not good against an attaching creditor.⁶

Affirming under oath that the consideration of a chattel mortgage is the sum for which it is given, without disclosing how the debt on which it is founded arose or was incurred,

¹ *Roberts v. Crawford*, 58 N. H. 499.

² *Hill v. Gilman*, 39 N. H. 88.

³ *Lovell v. Osgood*, 60 N. H. 71.

⁴ *Adams v. Rice*, 18 At. Rep. 652; Gen. Laws, ch. 137, §§ 6, 10; *Gooding v. Riley*, 50 N. H. 400; *Clark v. Tarbell*, 57 N. H. 328.

⁵ Laws of 1881, p. 226; Laws of 1878, p. 136; Laws of 1885, ch. 244.

⁶ *Field v. Silo*, 44 N. J. L. 355.

is not a compliance with the statute requiring the mortgagee to file an affidavit showing the consideration of his mortgage.¹

§ 72. **North Carolina.**—The following is the form prescribed by statute for chattel mortgages not exceeding \$300:

“I, —, of the county of —, in the State of North Carolina, am indebted to —, of — county, in said State, in the sum of — dollars, for which he holds my note, to be due the — day of —, A. D. 189—, and to secure the payment of the sum, I do hereby convey to him these articles of personal property, to wit: [here follows description]; but on this special trust, that if I fail to pay said debt and interest on or before the — day of —, A. D. 189—, then he may sell said property, or so much thereof as may be necessary, by public auction, for cash, first giving twenty days’ notice, at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

“Given under my hand and seal this — day of —, A. D. 189—.

“[Signature. Seal.]”²

§ 73. **Ohio.**—Before filing the mortgage the mortgagee must enter thereon a verified statement, “in dollars and cents,” of the amount of his claim, and that it is just and unpaid.

And in case such instrument shall have been given to indemnify the mortgagee against a liability as surety for the mortgagor, he shall enter thereon a true statement of such liability, and that such instrument was taken in good faith to indemnify against any loss that may result therefrom; which statement shall, in either case, be verified before some justice of the peace, or other officer authorized to administer oaths.³

§ 74. **Instances.**—Under the act requiring a chattel mortgage given to indemnify a mortgagee against a liability as

¹ Ehler v. Turner, 35 N. J. Eq. 68.

² Gen. Laws, §§ 1273, 1274.

³ Act of May 7th, 1869; 66 Ohio Laws 345; Rev. Stat. § 4154.

surety for the mortgagor, to have entered thereon a true statement of such liability, and that the instrument was taken in good faith to indemnify against any loss resulting therefrom, it will render the mortgage void as against creditors of the mortgagor, if such statement is omitted.¹

The affidavit required need not be made in any particular form. If the affidavit contains the requisite facts, the form in which they are stated is immaterial. When the affidavit refers to matters contained in the mortgage, the matters thus referred to are to be regarded as part of the affidavit.

A mortgage was given to secure the mortgagee against his liability on a note as surety for the mortgagor, also to secure the payment of a note held by the mortgagee against a third person. The affidavit showed the nature and amount of the liability of the mortgagee as surety as well as the amount due on the note held by him, and that the mortgage was executed in good faith to secure the payment of both notes. It was held that the affidavit was sufficient, although the statement "in dollars and cents" contained in the affidavit is the aggregate of both notes.²

§ 75. **Utah.**—The mortgage must be accompanied by an affidavit of the parties of the good faith of the parties, and that it is not intended to hinder, delay or defraud creditors of the mortgagor, and the mortgage must be witnessed and acknowledged by the mortgagor.³

§ 76. **Vermont.**—The parties thereto must make an affidavit which, with the certificate of the oath signed by the authority administering the same, shall be made upon, or appended to, such mortgage, and recorded therewith. When a corporation is a party to such mortgage, the affidavit may be made by any director, cashier or treasurer thereof, or by any person authorized by the corporation. If such mortgage be given to indemnify the mortgagee against any liability assumed, or to secure any agreement, such agreement

¹ *Hanes v. Tiffany*, 25 Ohio St. 549.

² *Gardiner v. Parmalee*, 31 Ohio St. 551.

³ Gen. Laws 1884, ch. 21, §§ 1-5.

shall be stated truly and specifically in the condition of the mortgage, and the affidavit shall be made to conform thereto.

The form of the affidavit is :

“ We severally swear that the foregoing mortgage is made for purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that the same is a just debt, honestly due and owing from the mortgagor to the mortgagee.”¹

§ 77. **Instances.**—Under the statute of Vermont, which provides that, when a chattel mortgage is to secure the fulfillment of an agreement to pay a debt due from the mortgagor to the mortgagee, the agreement shall be stated in the condition, and the affidavit conformed thereto, if the affidavit is thus made out, but the statement is contrary to the facts, the mortgage is invalid.²

An affidavit is sufficient, under this statute, which states that the mortgage is made “ for the purpose of securing the debt specified in the condition thereto ; ” the condition showing that the mortgage was given to secure the mortgagee against liability as an indorser for the mortgagor.³

§ 78. **Washington.**—In this State the mortgagor must make an affidavit, which must accompany the mortgage, that the mortgage is given in good faith and not for the purpose to delay, hinder or defraud the creditors of the mortgagor.⁴

¹ Rev. Stat. § 1967.

² Rev. Stat. § 1967 ; *Tarbell v. Jones*, 56 Vt. 312.

³ *Gilbert v. Vail*, 60 Vt. 261.

⁴ Rev. Code, § 1986.

CHAPTER II.

VALIDITY.

ARTICLE I.—PRINCIPLES GOVERNING.

- 79. Statement of the Law.
- 80. A Bill of Sale.
- 81. A Subsequent Mortgage, the First Being Void.
- 82. Acknowledged and Filed After Property is Taken by a Receiver.
- 83. Dating Back—Alterations—Printed and Written Words.
- 84. When Upheld as a Conveyance.
- 85. Execution in Blank.
- 86. No Authority to Execute.
- 87. As to Crops.
- 88. Identification of Property.
- 89. Usurious Interest on Secured Note.

§ 79. **Statement of the Law.**—It is essential that the general principles of the law be considered in a contract for a mortgage, as in other agreements, and that the statutory provisions be followed. In case of conflict of authority, the doctrine of the State Supreme Court should be closely followed. Thus, in Colorado,¹ it is held that a mortgage void in part is void altogether; so, accordingly, when a chattel mortgage covers a stock of goods, and the mortgagor is allowed to retain possession and sell for his own benefit, the mortgage is void as to the creditors of the mortgagor, and the fact that the mortgage includes other property besides the merchandise does not change the result. Other authority holds the doctrine that, if the mortgage be void as to a portion of the property named therein, it is void altogether.²

But then there are courts that hold the contrary, and declare such instruments may be void in part and in part valid.³

¹ *Wilson v. Voight*, 9 Colo. 614 (opinion by Helm, J.)

² *Horton v. Williams*, 21 Minn. 187; *Russell v. Winne*, 37 N. Y. 591.

³ *Barnet v. Fergus*, 51 Ill. 352; *In re Kahley*, 2 Biss. C. C. 383; *In re Kirkbride*, 5 Dill. C. C. 116.

If a chattel mortgage is given to defraud creditors, then it is invalid as to them.¹ Thus, where a chattel mortgage or a written assignment of personal property is executed in part to indemnify the mortgagees or assignees against a possible liability on a redelivery bond, and another and important object of the instrument is to delay, hinder and defraud the creditors of the mortgagor or assignor, and such intention is participated in by all the parties thereto, such instrument is fraudulent *in toto*, and cannot be sustained to any extent as against such creditors.

Chief Justice Horton says although one object in making the written assignment was to indemnify the mortgagee or assignee against possible liability on a redelivery bond, yet, as another and important object of the instrument, participated in by both parties, was to delay, hinder and defraud the creditors of the mortgagor or assignor, it is also fraudulent *in toto*.²

The fact that several mortgages were executed at the same time, does not make them all a part of one transaction, so that the invalidity of one attaches to the others.³ Nor is a chattel mortgage invalidated by an agreement indorsed on the note by the mortgagor, "that the same shall be due at once if the mortgaged property is seized on execution or other writ."⁴ Neither is it made void because it is witnessed by the mortgagee's brother-in-law, a notary public.⁵

A verbal agreement, upon a sufficient consideration, by which the owner grants a lien upon chattels, to secure an obligation, is valid between the parties to the instrument, and, in many States, those having actual notice of the existence of the lien.⁶

Parties to a mortgage cannot set up a mistake therein,

¹ Wallach v. Wylie, 28 Kans. 138.

² Winstead v. Hulme, 32 Kans. 568.

³ Hoey v. Pierron, 67 Wis. 262.

⁴ Dice v. Irvin, 110 Ind. 561.

⁵ Welsh v. Lewis, 71 Ga. 387. But the acknowledgment before one of the mortgagees makes the mortgage void. Hammers v. Dole, 61 Ill. 307.

⁶ Sparks v. Wilson, 22 Nebr. 112.

against an innocent purchaser of the secured notes and holder of the mortgaged debt.¹ Nor the informalities in the execution or attestation of a mortgage, created by verbal contract and reduced to writing, do not affect its validity as between the parties to it.²

§ 80. **A Bill of Sale.**—A bill of sale from vendor to vendee of property on a condition of defeasance that vendor should pay all costs in certain pending suits for which vendee had become security, is a valid chattel mortgage as between the parties, giving the mortgagee the right to take immediate possession of the property. Thus, where a vendor sells cattle on a bill of sale, on a condition of defeasance, to secure the vendee for becoming security on a bond, it is a valid chattel mortgage between the parties, and the vendee had the right to take immediate possession of the cattle.

Judge Elliott says the bill of sale was, in effect, a chattel mortgage. Though not executed and recorded as required by statute, it was nevertheless a valid mortgage between the parties; and, as soon as the mortgagee received the bill of sale, he had a right to take immediate possession of the cattle, and hold them as security against his liability on his bond.³

A charge that such a sale was void for uncertainty, might be sustained as to the rights of third parties, but as between the parties it was binding, and especially when the mortgagee takes possession of the property. It is not to be presumed that the parties, in the absence of proof, made an instrument to be of no legal effect whatever, even between themselves. The presumption is, that the parties mean to make a valid, binding contract.⁴

A mortgage of shares of stock, although land is also included in the mortgage, is valid and binding between the parties, without delivery of possession of the certificate of stock.

¹ *Hayden v. Snow*, 14 Fed. Rep. 70.

² *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514.

³ *Horton v. Reitler*, 12 Colo. 310. See, also, *Landon v. Emmons*, 97 Mass. 37.

⁴ *Draper v. Perkins*, 57 Miss. 277; *Richardson v. Lumber Co.*, 40 Mich. 203.

Chief Justice Searls says :

“ We are not aware of any case in which, independent of statute, it has been held that a sale of personal property, and retention of possession thereof by the vendor or mortgagor, is void as between the parties thereto. The great contest which has been urged upon questions growing out of the retention of possession of personal property by the vendor or mortgagor after a sale or mortgage, has been, not between the parties, but between the creditors of the mortgagor or vendor on the one hand and the parties on the other. The contest, from the days of the celebrated *Twyne Case*, 3 Coke 80, was continued in England for several generations, and resulted in an adjudication of the question in all its phases. We inherited it from English ancestors, and the courts of the several States have been called upon to go over much of the same ground. In most of the States of the Union statutes have been passed setting at rest the more important questions involved in the problem.”¹

When a mortgagee claims under a bill of sale, in which a specific consideration is expressed, but says that it was the intent and agreement to secure a much larger indebtedness, the instrument, as against creditors of the mortgagor, is valid only to the amount set out. Judge Cahill says that this claim can only be sustained when the instrument itself shows that it was given and intended to secure a larger amount than that named as the consideration, but that this rule can only apply to those cases where a discrepancy appears upon the face of the paper between the consideration mentioned at the commencement and the debt described in the later conditions of the instrument. Without this discrepancy the creditors of the mortgagor are entitled to treat the instrument as valid only to the amount specified.²

§ 81. **Subsequent Mortgage, First Being Void.**—The fact that a chattel mortgage recognizes the priority of a former mortgage as void does not invalidate the second mortgage as

¹ *Tregear v. Etiwanda Water Co.*, 76 Cal. 537.

² *Mueller v. Provo* (Mich.), 45 N. W. Rep. 498.

between the mortgagees therein and attaching creditors of the mortgagors. Judge Boreman, speaking for the court, says that when there is no question raised as to the *bona fides* of the second mortgage, there can be no reason why it should not be sustained, even though the first mortgage may be void. That there is no impropriety in one mortgage recognizing the priority of another mortgage. It does not become a part of the first mortgage, but it simply provides that "all liabilities which have arisen or may hereafter arise by reason of a certain mortgage to a prior mortgagee, on the same property, shall be first paid." If the first should be void, there would be no liabilities arising therefrom, and the second would become the first mortgage upon the property. The recognition of the first mortgage might prevent the mortgagee in the second mortgage from contesting the validity of the first mortgage, but it could in no way prevent other persons from so contesting.

Accordingly, when the second mortgagee has taken rightful possession of the property, it could not be attached, at least until such valid mortgage had been satisfied.¹

§ 82. **Acknowledged and Filed After Property is Taken by Receiver.**—The mortgagee cannot set up a prior lien as against a receiver appointed by the court, when the mortgage is not executed and filed according to statute. Thus, where a chattel mortgage is not acknowledged and filed for record until after the property has come into the hands of a receiver, appointed in a suit by the vendor to enforce his right to the purchase price, the mortgagee is not entitled to priority of lien.²

§ 83. **Dating Back—Alterations—Printed and Written Words.**—The mere dating back of a mortgage does not affect the validity of it. Thus, a chattel mortgage given in November, and at once properly filed, being dated back to January, will not affect its validity.³

¹ Eddy v. Ireland (Utah), 21 Pac. Rep. 501.

² Smith v. Fletcher (Ark.), 11 S. W. Rep. 824.

³ Johnson v. Stellwagen, 67 Mich. 10.

When an alteration of the mortgage debt appears on the face of the paper, and is obviously so material and beneficial to the mortgagee as to be suspicious in its nature, this fact, according to the better rule, casts on the mortgagee, as holder, the burden of removing the suspicion by showing that it was made by a stranger, without his knowledge or leave, or otherwise to explain satisfactorily the alteration. If made before the completion of the instrument, or with the consent of the party to be charged under it, this would be a sufficient explanation.¹

It is the general rule that when printed words in an instrument cannot be reconciled with the written, the written are the best exponent of the maker's intention and must prevail.² A mortgage was executed on a printed form, and covered "the entire crops of corn, cotton, fodder, cotton-seed, and all other crops of every kind or description, which may be made and grown the present year," on certain farms, by the mortgagor, "to the extent of one hundred bales of cotton," the latter clause alone being written. This was held an absolute mortgage of the cotton, and covered the other crops to secure its delivery or payment of its value.

The court says that the instrument is an absolute mortgage, so to speak, on one hundred bales of cotton, and that it covers also the other crops, but only for the purpose of securing the delivery of one hundred bales of cotton, or the payment of the value thereof, and only to the extent necessary to an effectuation of that purpose, because no other construction will admit of some meaning being given to each of the words employed.³ Judge McClellan, who rendered the decision of the court, had a different opinion from the majority. His own opinion was, that it covered only one hundred bales of cotton, and bases his conclusion on the following considerations: The words "entire crop of corn, cotton, cotton-seed," &c., appear in the printed form. They

¹ *Hill v. Nelms*, 86 Ala. 442.

² *Express Co. v. Pinckney*, 29 Ill. 410; *Robertson v. French*, 4 East 130.

³ *Comer v. Lehman*, 87 Ala. 362.

are inconsistent with the written limitations, which, to his mind, refer to the substantive term "entire crop," and confine the operation of the instrument to one hundred bales of cotton out of the crop. The use of the words "of corn, cotton, cotton-seed," &c., is due to the fact that they were a part of the printed paper, intended for general application, and is not referable to the intention of the parties to this particular transaction. "In such cases the rule is to discard the irreconcilable printed words and look alone to those that are written as being the best exponents of intention."

When a mortgage as originally executed and recorded is changed by the consent of the parties, by inserting articles in it, it becomes a new mortgage as to these inserted chattels—if not to all the chattels—and is valid between the parties.¹

A mortgage is not invalid by reason of the omission of words purporting to grant, sell, convey and the like, usually found in a mortgage. Such words are entirely unnecessary. The word "mortgages" covers the whole ground.²

Where the mortgagee, without the consent of the mortgagor, alters the mortgage after delivery, but before he has taken possession of the chattels as provided in the mortgage, by inserting the description of other property of the mortgagor, such alteration will avoid the mortgage.

Judge Robinson holds that the right to take possession, and to sell the property and pay the mortgage debt, depended upon the covenants of the mortgage. If the alteration destroyed those covenants, it necessarily terminated the right of the mortgagee to the remedy which they provided. "To say that the mortgagee acquired a vested right to that remedy when the mortgage was delivered, which could not be affected by its subsequent alteration, would be to say that such alteration, however fraudulent and material, would be without effect. It is clear that a rule of that kind would encourage fraud, and be in conflict with the authorities."³

¹ *Adams v. Rice* (N. H.), 18 At. Rep. 652.

² *Marsh v. Wade* (Wash.), 20 Pac. Rep. 578.

³ *Hollingsworth v. Holbrook* (Iowa), 45 N. W. Rep. 561.

There is a conflict of authority as to the effect which should be given to the fraudulent alteration of an instrument of conveyance. But the better opinion is, that where an instrument of conveyance, a mortgage or other transfer, has fully accomplished the purpose for which it was executed before the alteration was made, the interest transferred will not be affected.¹

And when, by request of mortgagor, part of the property embraced in the mortgage is released, and other property substituted by interlineation, the mortgage as altered is valid. Judge Clopton says that when a mortgage is interlined by consent of the parties, and other property substituted, it becomes operative as an instrument of conveyance, having the same effect, as between the parties, as if a new mortgage had been made. "Neither attestation by witnesses nor acknowledgment before an officer is essential to the valid execution of a mortgage, hence the insertion of other personal property by consent of all the parties, does not affect its validity. A resubscription would be a mere formal and useless ceremony."²

When a mortgage of chattels is interlined by inserting new articles of the mortgagor, and again delivered to the mortgagee, with intent that he should retain it as thus altered, it becomes operative as an instrument of conveyance, having the same effect as between the parties as if a new mortgage had been made.³

§ 84. **When Upheld as a Conveyance.**—An instrument intended to be a trust, or to secure advances for agricultural purposes, such as are authorized by the North Carolina statute, but which wants some essential requisites, will be upheld nevertheless, as a conveyance, if it is in form sufficient to operate as such under the law.⁴

¹ *Woods v. Hilderbrand*, 46 Mo. 284; *Hatch v. Hatch*, 9 Mass. 307; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Kendall v. Kendall*, 12 Allen (Mass.) 92.

² *Winslow v. Jones*, 88 Ala. 496.

³ *Bassett v. Bassett*, 55 Me. 127. See, also, 1 Green. Ev. § 568a, note 1; *Sharpe v. Orme*, 61 Ala. 263.

⁴ *Spiney v. Grant*, 96 N. Car. 214.

If the intent of the parties was to execute an instrument such as the statute authorizes, and they fail in some essential part of its requirements, and the instrument is nevertheless in form sufficient to operate as a conveyance under the general law, it must be so upheld.¹

§ 85. **Execution in Blank.**—A chattel mortgage with blank left for the insertion of the name of the mortgagee, is of no validity as against a vendee of the mortgagor.² A mortgage with no grantee is a mere nullity. Such instrument is imperfect upon its face. “No mortgagee or obligee was named in it, and no right to maintain an action thereon or to enforce the same was given therein to the plaintiff or any other person.” It was, *per se*, of no more legal force than a simple piece of blank paper.³

And a mortgage with blanks left for the mortgagee's name and the sum borrowed is invalid.⁴ So, a bond written and delivered without an obligee, is a mere nullity.⁵ So, a deed cannot be valid until the grantee's name is inserted.⁶

Under a statute, as at common law, a grantor, a grantee and a thing to be granted must all be described in a deed.⁷ So, the notes secured by a mortgage are evidence of the debt and the time of payment, and when certain notes, stating definitely the amounts and times of payment, were duly executed, and a chattel mortgage on certain property to secure the same, in blank, but to be filled up in the ordinary form, was also signed, it was held that a provision in the mortgage, inserted without the mortgagor's consent or knowledge, changing the times of payment from those stated in the notes, was not binding on him.⁸

§ 86. **No Authority to Execute.**—A chattel mortgage is not

¹ Rawlings v. Hunt, 90 N. Car. 270.

² Herr v. Denver Mill and Mer. Co., 13 Colo. 406.

³ Chauncey v. Arnold, 24 N. Y. 330.

⁴ Drury v. Foster, 2 Wall. (U. S.) 24.

⁵ Preston v. Hull, 23 Gratt. (Va.) 600.

⁶ Upton v. Archer, 41 Cal. 85.

⁷ Simms v. Hervey, 19 Iowa 273.

⁸ Ward v. Watson, 24 Nebr. 592.

valid unless mortgagor has an interest in the property, or the one executing it has authority from the owner of the property. Thus, a mortgage signed and executed by a firm having no title or interest in the property therein described, and no authority to execute the mortgage, does not convey or transfer the legal or equitable title to the property.¹

§ 87. **As to Crops.**—An owner of land may, at common law, make a valid mortgage of crops sown thereon, but not yet growing.² When the words of grant in the instrument are that the grantor “conveys a lien upon each and every of said crops,” to be made upon certain land, such words will constitute a valid mortgage upon the crops, although they be not planted at the time when such instrument is executed and registered.³ Where wheat had been sown in the fall of 1878, and a chattel mortgage taken, dated February 5th, 1879, of “all the wheat and other crops now growing” on the land, it is valid.⁴ And a chattel mortgage upon growing crops as against attaching creditors, continues to be a lien, as held by many courts, upon the crop in the possession of the mortgagor, after severance and removal from the land.⁵ A crop to be planted on one’s own land, or on land let to him, as well as the crop planted and in process of cultivation, is the subject of a valid mortgage.⁶

A verbal mortgage of crops which have not yet been planted, though valid as between the parties, does not convey a legal title on which the mortgagee, without acquiring possession of the crop, can maintain detinue or trover against a third person.⁷

A person who has a valid lien under a verbal mortgage on a crop which was not planted when the mortgage was given,

¹ *Jewell v. Simpson*, 38 Kans. 362. See, also, *Commonwealth v. Lee*, 149 Mass. 179.

² *Catlin v. Willoughby*, 83 N. Car. 75; 35 Am. Rep. 564.

³ *Harris v. Jones*, 83 N. Car. 317.

⁴ *Hansen v. Dennison*, 7 Ill. App. 72.

⁵ *Rider v. Edgar*, 54 Cal. 127.

⁶ *Rawlings v. Hunt*, 90 N. Car. 270.

⁷ *Rees v. Coats*, 65 Ala. 256.

may maintain a special action on the case against any one who, with notice of such lien, has converted the crop, when gathered, to his own use.¹

A mortgage of cotton to be planted may be the subject of a valid mortgage, even as against creditors of the mortgagor.²

An instrument in form of a lease may be shown to be, in fact, a mortgage of a crop to be raised. If so construed, possession must have been taken, to render the mortgagee's title good as against a *bona fide* purchaser from the mortgagor.³

A mortgage of lands, including "the rents, issue and profits," is a lien on the crops growing on the premises.⁴

§ 88. **Identification of Property.**—In order to make the mortgage valid, one requisite is that the property must have identification or it will be void. Thus, a party claimed an equitable mortgage as the result of agreement by the defendant to give one to secure money furnished. The property was not in the State at the time of the supposed agreement, or in possession of the mortgagor. No one had specific information as to what it consisted of, it being a "plant" or manufacturing concern. This was not a sufficient identification of the property to which the alleged mortgage related, and the mortgage, if any, was invalid.⁵

The question of identity, however, between the mortgagee and the purchaser, as to the description of the property, may be settled by evidence outside of the mortgage.⁶ But property acquired in another State by a bailee and carried into another jurisdiction, to which, at the time of its removal, or subsequently, the legal title, by the law of the first State, still remained in another, cannot be mortgaged by the mere bailee in the latter State.⁷

¹ Rees v. Coats, 65 Ala. 256.

² Watkins v. Wyatt, 9 Baxt. (Tenn.) 250.

³ Lawson v. Moffat, 61 Wis. 153.

⁴ Montgomery v. Merrill, 65 Cal. 432.

⁵ Lee v. Cole, 17 Oreg. 559.

⁶ Mattingly v. Darwin, 23 Ill. 618.

⁷ Waters v. Cox, 2 Ill. App. 129.

§ 89. **Usurious Interest on Secured Note.**—One who receives notes secured by mortgage must not take usurious interest; if he does it will operate against him as in any other transaction. Thus, one to whom property is mortgaged to secure a usurious debt is not a *bona fide* purchaser thereof, and equitable defenses may be interposed against him, whether he had notice of them or not. Chief Justice Stone says that when the interest charged is in excess of the lawful rate per annum, the note is tainted with usury. So, the purchasers of the property are precluded from making the defense of *bona fide* purchasers or mortgagees.¹

ARTICLE II.—THE PARTIES.

- 90. Infancy—Lunacy.
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- 102. Bankruptcy—Rights of Assignee and Mortgagee.
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- 104. Tenants in Severalty.
- 105. Agent and Principal.
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§ 90. **Infancy—Lunacy.**—The capacity of the parties to convey by chattel mortgages is no different than that required in contracts generally.

An infant who has bought personal property and given a mortgage back to secure the purchase-money, or a part of it, cannot avoid the mortgage under the plea of infancy, without rendering void the sale and losing his rights under it. Thus, when an infant purchased a chattel and paid a part of the consideration, and at the same time gave his

¹ *Meyer v. Cook*, 85 Ala. 417. See *Collier v. Barr*, 64 Ala. 543. See, also, *Kemmitt v. Adamson* (Minn.), 46 N. W. Rep. 327.

notes and mortgage upon the chattel to secure the balance, he cannot repudiate the mortgage and hold the chattel against the mortgagee, or maintain trespass against him or his assignee for taking the chattel by virtue of the mortgage. The repudiation of the mortgage operates to nullify the sale, and consequently he cannot hold the chattel under the sale.¹

A mortgage given by a lunatic after inquisition found, if not void is voidable, whether the mortgagee knew of his unsoundness of mind or not.²

§ 91. **Infant's Mortgage Voidable, Not Void.**—An infant's mortgage of personal property, by the weight of authority, is not void but voidable. It is binding upon him until avoided. Chief Justice Gilchrist thus expresses the doctrine: "The case of a promissory note rests on the same ground as other executory contracts. It is not void, because it may be confirmed, but it is invalid, that is, without binding force, until it is confirmed. The executory contracts of an infant are said to be voidable, but this word is used in a sense entirely different from that in which it is applied to executed contracts of an infant. In the latter case, the contract is binding until it is avoided by some act indicating that the party refuses longer to be bound by it. In the former case, it is meant merely that the contract is capable of being confirmed or avoided, though it is invalid until it has been ratified."³

§ 92. **Borrowed Money—Remaining in Possession.**—A mortgage of an infant upon personal property for borrowed money, there being no delivery of the mortgaged property, is voidable at his election, at any time during his infancy. If the property is taken from him under the mortgage, without his consent, he may reclaim it upon disaffirmance of the contract, without returning or offering to return the money borrowed, it not appearing he had the ability so to do.

If an infant can borrow money upon a mortgage security

¹ *Heath v. West*, 28 N. H. 101.

² *Mohr v. Tulip*, 40 Wis. 66.

³ *Edgerly v. Shaw*, 25 N. H. 514. See, also, *Carr v. Clough*, 26 N. H. 280.

upon his property, without reference to his necessities, and cannot, upon reaching the age of legal discretion and capacity, or before, repudiate the transaction, except upon the condition of returning the amount of the loan, whether he had it or not, this privilege which the law accords to infancy for its protection, will generally be of little benefit. "Under the operation of such a rule, money-lenders would soon become permanently possessed of the property of infant spendthrifts, for with them the demands to borrow for immediate gratification are generally to be resisted. Its adoption as a rule would be in violation of the principle of protection that underlies the whole doctrine of the law pertaining to the dealings and contracts of infants."¹ The general rule seems to be, that if an infant rescinds the contract and avoids his liability upon it, he must surrender the consideration and restore what he has received, for it would be unjust to permit him to recover back what he has paid or delivered, and at the same time permit him to retain the fruits of the contract, which he has received.² But this rule is subject to an important qualification. A distinction is to be observed between the case of an infant in possession of such property after age, and when he has lost, sold or destroyed it during his minority. In the former case, if he has put the property out of his power, he has ratified the contract and rendered it obligatory upon him; in the latter case, the property is to be restored, if it be in his possession and control. If the property is not in his hands, nor under his control, that obligation ceases. To say that an infant cannot recover back his property which he has parted with under such circumstances, because by his indiscretion he has spent, consumed or injured that which he received, would be making

¹ *Miller v. Smith*, 26 Minn. 248. And see *Stafford v. Roof*, 9 Cow. (N. Y.) 426; *Chapin v. Shafer*, 49 N. Y. 407; *Randall v. Sweet*, 1 Den. (N. Y.) 460; *Riley v. Mallory*, 33 Conn. 201; *Price v. Furman*, 27 Vt. 268; *Carr v. Clough*, 22 N. H. 291; *Willis v. Twambly*, 13 Mass. 204; *Carpenter v. Carpenter*, 45 Ind. 142; *Bailey v. Barenberger*, 11 B. Mon. (Ky.) 114; *Grace v. Hall*, 2 Hump. (Tenn.) 27; *Leacox v. Griffith*, 76 Iowa 89.

² *Taft v. Pike*, 14 Vt. 405; *Weed v. Beebe*, 21 Vt. 495; *Hillyer v. Bennett*, 3 Edw. Ch. (N. Y.) 222; *Kitchen v. Lee*, 11 Paige (N. Y.) 107.

his want of discretion the means of binding him to all his improvident contracts, and deprive him of that protection which the law designed to secure to him. The weight of authority fully sustains this qualification of the rule.¹

But the Ohio courts do not accept this doctrine, and hold that where an infant purchases a chattel, and at the same time, and in part performance of the contract of purchase, executes a mortgage on the purchased property to secure the payment of the purchase-money, it is not within the privilege of infancy to avoid the security given without also avoiding the purchase. If, in such case, the infant should rescind a part, he must rescind the whole contract, and thereby restore to his vendor the title acquired by the purchase. The privilege of infancy may be used as a shield, but not as a sword. And in such case, if the infant sells the mortgaged property, the purchaser takes it subject to the mortgage.²

If he borrows money and improvidently disposes of it, as the law, from his want of discretion, presumes he may do, this very indiscretion which the law endeavors to shield and protect, becomes the means of fastening the imperfect obligation irrevocably upon him, and his inability to refund what he has borrowed affirms his contract to repay it with interest. It is needless to say that there is no privilege and no protection in any such rule, and it is not in accord with the current of authority.³

But there is no reason why one who, by means of a voidable contract made in his infancy, has obtained possession of property which he retains on coming of age, should be allowed to disaffirm the contract and at the same time retain

¹ *Fitts v. Hall*, 9 N. H. 441; *Robbins v. Eaton*, 10 N. H. 561; *Boody v. McKenney*, 23 Me. 517; 1 Amer. Lead. Cases 260, note by Hare and Wallace.

² *Curtiss v. McDougal*, 26 Ohio St. 66. And see *Kinner v. Maxwell*, 66 N. Car. 45; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428; *Vint v. Osgood*, 19 Pick. (Mass.) 572; *Jenkins v. Walker*, 17 Me. 38; *Abell v. Warren*, 4 Vt. 149; *Thomas v. Dike*, 11 Vt. 273.

³ *Corey v. Burton*, 32 Mich. 30.

the benefit derived from it. In such case, if he retains the property, he is justly held to affirm the contract.¹

It is held by some courts that an infant cannot demand the return of the property sold by him until he shall return the purchase-money.²

So, also, it is held that where property is sold and a mortgage given back to secure the purchase-money, it is in law one transaction; that this is well settled in regard to real-estate property, and the doctrine should be applied to personal property;³ that there is no reason to except a mortgage of chattels from the general rule which is applied to mortgages of real estate, and the law governing an infant as to real estate will operate in chattel mortgages.⁴

§ 93. **May Disaffirm in a Reasonable Time.**—An infant has a reasonable time, after becoming of age, to disaffirm his contracts. He may avoid the mortgage before he is of age, or after it, provided he does it in a reasonable time after becoming of age. What is a reasonable time is a question for the jury.⁵ The mere fact that property purchased by him remains undisposed of at the time of his coming of age does not make the previous promise to pay for it binding upon him, unless he has in some unequivocal manner dealt with it as his own after that time.⁶

¹ *Lawson v. Lovejoy*, 8 Me. 405; *Boyden v. Boyden*, 9 Met. (Mass.) 519; *Cresinger v. Welch*, 15 Ohio 156; *Aldrich v. Grimes*, 10 N. H. 194; *Armfield v. Tate*, 7 Ired. (N. Car.) 258; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Delano v. Blake*, 11 Wend. (N. Y.) 85; *Cheshire v. Barrett*, 4 McCord (S. Car.) 241.

² *Holmes v. Blagg*, 8 Taunt. 508; *Cope v. Overton*, 10 Bing. 252; *Farr v. Sumers*, 12 Vt. 28; *Zouch v. Parsons*, 3 Burr. 1794.

³ *Roberts v. Wiggin*, 1 N. H. 73; *Robbins v. Eaton*, 10 N. H. 561; *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. Boright*, 9 Vt. 368; *Weed v. Beebe*, 21 Vt. 495. Where the property of an infant is delivered, and thus the mortgage takes effect, the title passes to the mortgagee. *Ferguson v. Clifford*, 37 N. H. 86; *Call v. Gray*, 37 N. H. 433.

⁴ *Lowe v. Gist*, 5 Harr. & J. (Md.) 106. See, also, *Gillett v. Stanley*, 1 Hill (N. Y.) 121; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Moore v. Abernethy*, 7 Blackf. (Ind.) 442; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Jenkins v. Jenkins*, 12 Iowa 195; *Wharton v. East*, 5 Yerg. (Tenn.) 41; *Vaughn v. Parr*, 20 Ark. 600.

⁵ *Chapin v. Shafer*, 49 N. Y. 407; and see *Sparr v. Florida S. R. R. Co.*, 25 Fla. 185.

⁶ *Smith v. Kelley*, 13 Met. (Mass.) 309. See, also, *Minock v. Shortridge*, 21 Mich. 304.

The ground upon which it is held that one who, by means of a voidable contract made in his infancy, has obtained possession of property which he retains on coming of age, may not disaffirm the contract and at the same time retain the benefit derived from it, is that the conduct after he has reached the age of discretion has precluded his relying upon an infant's privilege, and what he may have done previously cannot bind him either by way of contract or of estoppel.¹

§ 94. **When Acquiescence Not a Disaffirmance.**—So, where an infant executed a chattel mortgage, mere acquiescence or failure to disaffirm by merely postponing the act of repudiation after attaining majority, is not a legal ratification.²

§ 95. **Chattel Mortgage of a Married Woman.**—The right of a married woman to give a chattel mortgage upon her separate estate is regulated by statutory provisions, where there is such a right, and the statutes of the different States must be consulted for the interpretation of the law. In Massachusetts a mortgage by a married woman on goods of which she avouches herself therein to be the owner, but which really belonged to her husband, passes no such title as to enable the mortgagee to replevy them from a third person, although the husband has indorsed on the mortgage that he formally sanctions and ratifies his wife's action, she having been made his agent for the transaction of business.³

To secure a loan made by a wife to her husband of money which came to her before marriage, the husband executed a mortgage of chattels to a third party to secure the payment of the promissory note of even date, signed by the husband and payable to the third party or order. On the same day the third party executed a deed on the back of the mortgage, assigning to the wife the mortgage deed, the note and claim thereby secured, and all his right, title and interest in the property mortgaged. It was decided that the wife, after a

¹ *Corey v. Burton*, 32 Mich. 30.

² *Hill v. Nelms*, 86 Ala. 442.

³ *Lewis v. Buttrick*, 102 Mass. 412.

demand under the Gen. Stat., ch. 123, § 63, could maintain an action against an officer who attached the mortgaged property on a writ against the husband, and that she might properly, in her demand upon the officer, describe the sum due upon the note as due to her upon the mortgage.¹ By the assignment of the mortgage the legal as well as the equitable title in the mortgaged property passed to the wife, although she could not, for a like reason, foreclose it while her husband continued to own the equity of redemption.² And a wife, being the lawful owner of a chattel mortgage, duly recorded, may maintain any action necessary to protect her title or possession thereto against a third person.³

So, a chattel mortgage executed by a debtor to his wife, to secure a *bona fide* indebtedness is valid as against his other creditors, and it is immaterial that the statute of limitations had run against a portion of the debt thus preferred.

Judge O'Brien says that dealings between husband and wife, which result in the appropriation of the husband's property for the payment of a debt claimed to be due to the wife, to the exclusion of other creditors, it must be admitted, furnish uncommon opportunities for the perpetration of fraud, and should be carefully and rigidly scrutinized. But the husband is not obliged by any duty he owed his other creditors to interpose the statute of limitations as a defense to the validity of the mortgage. When the wife, by proper and sufficient proof, shows that her husband owes her, she is entitled to the same remedies and has the same standing to enforce any security for the payment of the debt that she may have received, as any other creditor.⁴

When a married woman indorses notes in order to obtain security for a debt owing her by the maker, who thereupon

¹ Degan v. Farr, 126 Mass. 297.

² Tucker v. Fenno, 110 Mass. 311.

³ Landon v. Emmons, 97 Mass. 37. But such a mortgage would be invalid if the husband had the right to reduce the money to possession. Phillips v. Frye, 14 Allen (Mass.) 36.

⁴ Manchester v. Tibbetts, 121 N. Y. 219. The dealings between husband and wife are now mostly controlled by statutes in derogation of the common-law rule.

executes to her a mortgage to secure her debt and the indorsed notes, the mortgagee becomes a trustee of the mortgaged property for the benefit of the persons holding the notes secured thereby, besides her own debt, and she will be protected to the whole amount, and not the amount of her own debt only.¹

§ 96. **Partnership Mortgages—Between the Partners.**—A valid chattel mortgage can be given from one partner to another. Thus, where two partners are cultivating a crop as equal partners, and one executes to the other a mortgage of his entire interest, as security for an individual debt which the mortgagee has become liable to pay, and the mortgage contains the stipulation that, since the crop will be gathered before the maturity, the mortgagee shall take possession of it and dispose of it for the mutual benefit of the parties, and that the net profits, after settlement of the partnership debts, shall be divided into two equal parts, one of which shall belong to the mortgagee absolutely, and the other shall be held by him in trust for the mortgagor, to be applied to the payment of the secured debt, and the balance paid over to the mortgagor—such a mortgage does not affect the title and liability of the mortgagor as a partner. Nor does it limit his authority as a partner to contract debts in carrying on the business, or to pay debts so contracted.² And the chattel mortgage given of the interest of one member of the firm does not necessarily operate as a dissolution of the partnership.³ By the condition of an agreement a member transferred his interest in a firm as collateral security for the payment of a debt; but the transfer contemplated a continuance of the interest and authority in the firm. Such an instrument is merely a mortgage and did not dissolve the partnership.⁴

§ 97. **Partner's Interest.**—A partner cannot, by mortgaging

¹ *Showman v. Lee* (Mich.), 44 N. W. Rep. 1061.

² *Monroe v. Hamilton*, 60 Ala. 226.

³ *State v. Quick*, 10 Iowa 451.

⁴ *Du Pont v. McLaran*, 61 Mo. 502.

the partnership property for his individual debt, deprive his copartner of his right in the property as security for money advanced by him for the firm.¹

But an assignment by one member of a partnership of all the interest he has in and to the stock of goods, notes and accounts due to the firm, vests the assignee with the interest of the assignor in a mortgage by the firm to secure a note due to it.²

§ 98. **Mortgaging Individual Goods.**—A partnership cannot mortgage the individual goods of one of the partners without his consent. Thus, when chattels owned by one partner but used by the firm, without having been converted into partnership property, were mortgaged to a third person without the owner's consent, a mortgage by him will be a valid lien, and his mortgage will hold the goods, though they were sold under the mortgage given by the other partner.³

§ 99. **Between Partner and Third Party.**—A legal mortgage cannot be made of partnership real estate without the concurrence of the partners.⁴ But one partner may execute a chattel mortgage of the firm property to secure a partnership debt without the consent of his copartners; and his attaching a seal to the instrument, it being unnecessary, will not affect its validity. This has reference more especially to commercial partnerships.⁵

But such a mortgage of his individual debt is invalid; yet, if on the payment of the firm's debts, and an accounting had of the assets of the firm, such mortgaged property falling to the mortgagor, it becomes operative and can be enforced.⁶

The individual property of the partners is not embraced in a partnership mortgage, unless specifically set out and

¹ *Deeter v. Sellers*, 102 Ind. 458.

² *Keith v. Ham* (Ala.), 7 South. Rep. 234.

³ *Cutler v. Hake*, 47 Mich. 80.

⁴ *Harrison v. Jackson*, 7 Term R. 207.

⁵ *Woodruff v. King*, 47 Wis. 261; *Hembree v. Blackburn*, 16 Oreg. 153.

⁶ *Smith v. Andrews*, 49 Ill. 28.

described.¹ A partner can execute a valid mortgage upon a partnership crop to secure a partnership debt, but he cannot mortgage the individual property of his copartner without his consent or acquiescence, under such circumstances as to create an estoppel.² A partner recognizing a chattel mortgage on the partnership property, executed by a partner, is estopped to deny its validity.³ Where no intervening statute prohibits, one partner has authority, without the consent or knowledge of his copartner, to mortgage the whole stock in trade of the firm to secure a particular creditor of the firm.⁴ One partner may execute a valid mortgage of a vessel owned by the firm, by signing the individual names of the members of the partnership.⁵

The execution of a mortgage of personal property of a partnership by one partner in his individual name, passes no title.⁶ A mortgage signed with the partnership name, but in the body of which is recited that it was the act of one of the partners, and given as a security for his individual debt, is not, on its face, a partnership act.⁷

Two parties leased a building and water-power, and put machinery into the building for the purpose of carrying on the partnership business. One of the partners gave a chattel mortgage on his interest for an individual debt. Both parties continued in the use of the machinery. On foreclosure of the mortgage it was decided that the mortgagee was entitled to the mortgagor's interest, that is, what interest he would have left after paying the debts of the partnership, including the rent.⁸

Generally, one partner cannot bind his copartner under

¹ Reid v. Godwin, 43 Ga. 527.

² Gates v. Bennett, 33 Ark. 475.

³ Richardson v. Lester, 83 Ill. 55; Hawkins v. Hastings, 1 Dill. C. C. 462.

⁴ Tapley v. Butterfield, 1 Met. (Mass.) 515; Woodruff v. King, 47 Wis. 261; Willett v. Stringer, 17 Abb. Pr. (N. Y.) 152; McClelland v. Rewsen, 3 Abb. App. Dec. (N. Y.) 74; Morrison v. Mendenhall, 18 Minn. 232.

⁵ Patch v. Wheatland, 8 Allen (Mass.) 102.

⁶ Clark v. Houghton, 12 Gray (Mass.) 38.

⁷ Scott v. Dansby, 12 Ala. 714.

⁸ Receivers v. Godwin, 1 Halst. (N. J.) 334.

seal, without especial authority, or unless the instrument is executed in his presence and by his consent, a seal being necessary to the validity of the mortgage or deed.¹

§ 100. **Must be a Member of a Commercial Firm.**—In general, a partnership may take security by way of mortgage, in the firm name, to secure a partnership debt.² A partnership may purchase and hold personal property, and there is no reason why it may not take security, by way of mortgage, upon the same to secure a partnership debt.³ But a partner, unless he is a member of a commercial firm, or one engaged in general promiscuous trading, has no implied authority to bind his firm by borrowing money and executing notes, mortgages or other securities, unless the money is necessary for the business, and such pledge of the credit of the firm is usual.⁴

In ordinary commercial partnership, each partner has the right to pledge the partnership property or to borrow money and give notes for partnership purposes in the firm name, and when credit is given to a partnership, within the scope of its business, it will bind all the partners, notwithstanding

¹ *McDonald v. Eggleston*, 26 Vt. 154; *Cummins v. Cassilly*, 5 B. Mon. (Ky.) 74; *Bentrine v. Zierlin*, 4 Mo. 417; *Fichthorn v. Boyer*, 5 Watts (Pa.) 159; *Lee v. Onstott*, 1 Ark. 206; *McCay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Turbeville v. Ryan*, 1 Humph. (Tenn.) 113; *United States v. Astley*, 3 Wash. C. C. 508; *Person v. Carter*, 3 Murph. (N. Car.) 321; *Lucas v. Sanders*, 1 McMull. (S. Car.) 311; *Morse v. Bellows*, 7 N. H. 549; *Hobson v. Porter*, 2 Colo. 28; *Snyder v. May*, 19 Pa. St. 235; *Modisett v. Lindley*, 2 Blackf. (Ind.) 119; *Napier v. Catron*, 2 Humph. (Tenn.) 534; *Trimble v. Koons*, 2 A. K. Marsh. (Ky.) 375; *Pierson v. Hooker*, 3 Johns. (N. Y.) 68; *Baldwin v. Richardson*, 33 Tex. 16; *Herzog v. Sawyer*, 61 Md. 344. But it has been decided that a mortgage under seal, executed by one member of a firm, binds him, but not the firm. *Weeks v. Mascoma Rake Co.*, 58 N. H. 101. In Missouri chattel mortgages must be acknowledged as conveyances of land. *Wagner's Stat.* 281. Under this law a partnership mortgage may be signed and acknowledged by any one of the partners with the firm name, although his name does not appear in the style of the partnership. *Peck v. Fisher*, 58 Mo. 532.

² *Johnson v. Grissard*, 51 Ark. 410; *Perifull v. Platt*, 36 Ark. 456; *Morse v. Carpenter*, 19 Vt. 613; *Sherry v. Gilmore*, 53 Wis. 324; *Lumber Co. v. Ashworth*, 26 Kans. 212; *Newton v. McKay*, 29 Mich. 1; *Beaman v. Whitney*, 20 Me. 413; *Hoffman v. Porter*, 2 Brock. C. C. 156; *Murray v. Blackledge*, 71 N. Car. 492.

³ *Kellogg v. Olson*, 34 Minn. 103.

⁴ *Davis v. Richardson*, 45 Miss. 499.

any secret arrangement they may have among themselves, unknown to those extending the credit.¹ And a mortgage is valid which gives the description of the partnership mortgagors by naming only the firm's name, without more particulars.²

So, it may be stated as a general rule that one member of a commercial firm has authority to mortgage the chattels of the partnership to secure the payment of partnership debts, without the knowledge or consent of the other members of the firm,³ but the chattel mortgage must be in furtherance of the partnership business; if it is not for the benefit of the partnership, neither partner has authority to execute it without the consent of all the members of the firm.⁴

But a partner in a non-trading partnership cannot bind his copartners by a bill or note, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he has express authority therefor from the other members of the firm, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnerships.⁵

Chancellor Kent, in his seventh edition of his Commentaries, omits the use of the terms "trading" and "non-trading" partnership, and makes the distinction between partnerships in respect of the power of one partner to bind the firm depend upon the single test of the usual scope of the business in connection with the subject-matter of the contract,⁶ though this distinction is not accepted by the majority of the courts.

¹ *Gregg v. Fisher*, 3 Ill. App. 261.

² *Henderson v. Gates*, 52 Ark. 371.

³ *Hembree v. Blackburn*, 16 Oreg. 153; *Woodruff v. King*, 47 Wis. 261; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; *Willett v. Stoniger*, 17 Abb. Pr. 152; *Morrison v. Mendenhall*, 18 Minn. 232; *Keck v. Fisher*, 58 Mo. 532. See *Harris v. Mayor (Md.)*, 20 At. Rep. 111; *Smith v. Sloan*, 37 Wis. 285; *Pease v. Cole*, 53 Conn. 53.

⁴ *Osborn v. Barge*, 29 Fed. Rep. 725.

⁵ *Smith v. Sloan*, 37 Wis. 285; and see *McDonald v. Eggleston*, 26 Vt. 154; *Cumins v. Cassilly*, 5 B. Mon. (Ky.) 74; *Bentrine v. Zierlin*, 4 Mo. 417; *Hedley v. Bainbridge*, 3 Q. B. 316; *Dickinson v. Valpy*, 10 Barn. & Cress. 128; *Brettel v. Williams*, 4 Exch. 623.

⁶ 3 Kent's Com. (7th ed.), p. 44.

The United States Supreme Court uses this expression in a case coming from Missouri: "It was also well settled by the decisions of that court, that each partner, by virtue of the relation of partnership, and of the community of right and interest of the partners, had full power and authority to sell, pledge or otherwise dispose of all personal property belonging to the partnership, for any purpose within the scope of the partnership business, and might therefore, without the concurrence of his copartners, mortgage the partnership property by deed of trust to secure the payment of partnership debts."¹

But this court uses "trading corporation" in speaking of the Ohio law. The court says: "In the recent case of *Rouse v. Merchants Bank*, 46 Ohio St. 493, that court, upon a similar state of facts, adjudged that mortgages made by a trading corporation after it had become insolvent, and had ceased to do business, to prefer some of its creditors, were invalid and ineffectual against creditors generally, without regard to the question whether the mortgages were or were not parts of the same transaction as an assignment under the statute."²

§ 101. **Widow Taking Place of Her Husband.**—A wife becoming a copartner in the place of her deceased husband, the presumption will be indulged that she becomes liable for his partnership debts, and a mortgage executed therefor is a good consideration.³

§ 102. **Bankruptcy—Rights of Assignee and Mortgagee.**—On an issue between the assignee of a partnership estate in bankruptcy and the mortgagee, any balance left after paying the debts, is payable to the mortgagee. The fact that, for additional security on the note, he had previously taken another mortgage from a third party, who was liable thereon as surety, does not affect the right of this preference.⁴ If

¹ *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223. See note in 31 Cent. L. Jour. 311, where the authorities are collected.

² *Smith Purifier Co. v. McGroarty*, 136 U. S. 237.

³ *Preusser v. Henshaw*, 49 Iowa 41.

⁴ *Thompson v. Spittle*, 102 Mass. 207.

the mortgage is invalid as against creditors, it is equally invalid as against an assignee for the benefit of creditors.¹ Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for the benefit of the assignment.²

The knowledge of the assignee as to the mortgage, when it was filed, and when the assignment was accepted by the assignee, cannot affect the question. He stands for the creditors, and they are not prejudiced by knowledge on his part which might have affected him had he been a subsequent purchaser.³

§ 103. **Mortgagee—Tenants in Common.**—A mortgagee may become a tenant in common of the property mortgaged. Thus, a party made a contract with his laborers for the cultivation of a crop on shares, by which a tenancy in common is created in the crop between the owner and the laborers. Afterwards he executed a mortgage, for supplies, on his interest in the crop. By this, the mortgagee becomes a tenant in common with the laborers until a division of the crop.⁴ So, also, the concurrent execution and delivery of two chattel mortgages upon the same property, to different parties, makes the mortgagees tenants in common of the property mortgaged.⁵ The legal effect is the same as it would be if the goods had been mortgaged under one instrument, to be held by them as security for their respective claims, and the proceeds, in case of sale, would be divided between them in proportion to the amounts of the interest of each.⁶

A mortgage was given and provided that the mortgagee might take immediate possession of the goods if the mortgagor attempted to sell them. Then the mortgagor made,

¹ *Hanes v. Tiffany*, 25 Ohio St. 549.

² *Blandy v. Benedict*, 42 Ohio St. 295.

³ *Westlake v. Westlake* (Ohio), 24 N. E. Rep. 412.

⁴ *Smith v. Rice*, 56 Ala. 417. See *Gaar v. Hord*, 92 Ill. 315; *Tylor v. Taylor*, 8 Barb. (N. Y.) 585; *Shuart v. Taylor*, 7 How. Pr. (N. Y.) 251.

⁵ *Welch v. Sackett*, 12 Wis. 243.

⁶ *Howard v. Chase*, 104 Mass. 249; *Hubby v. Hubby*, 5 Cush. (Mass.) 516.

simultaneously, three mortgages of the goods to three other mortgagees severally, which contained a clause that "this mortgage is of the same date, given at the same time, and to be recorded with the two others, all of which are alike in time; neither is to have precedence of the other, but to be alike security to each," and which expressed to be subject to the first mortgage. The last three mortgagees took title under the mortgages as tenants in common. The mortgages are the same as if they had been made as one conveyance to secure each party his separate debt, and the three mortgages are to be treated as substantially one conveyance.¹

A mortgage of personal property was made to several persons to secure them against their liability as indorsers for the mortgagors; no two of the mortgagees were liable upon any one paper. The terms were "certain and various notes of hand, drafts and checks." It was decided that these were used collectively, and it was intended to be said that, upon them, taken collectively, were the indorsements of each of the mortgagees. Whether the indorsements were several or joint, or whether the names of all were upon the same papers or not, the instrument must be construed, under the evidence disclosed, as expressing a joint interest, and any action for trespass upon their rights under the mortgage should be joint.²

§ 104. **Tenants in Severalty.**—But a mortgage given to two or more persons, to secure their several debts, is several and not joint.³ If two creditors take a chattel mortgage to secure their separate debts, if the mortgage is good as to one and invalid as to the other, it will be good as to the former and void as to the latter.⁴ The second mortgagee and the first mortgagee must sue in severalty. They are neither joint tenants nor tenants in common of the property.⁵

¹ Howard v. Chase, 104 Mass. 249.

² Wheeler v. Nichols, 32 Me. 233.

³ Burnett v. Pratt, 22 Pick. (Mass.) 556.

⁴ Sumner v. Dalton, 58 N. H. 295.

⁵ Newman v. Tymeson, 13 Wis. 172.

§ 105. **Agent and Principal.**—If an agent does not keep within the scope of his authority he cannot bind his principal, unless the latter does some act to ratify the transaction. Thus, an absolute sale, made by an agent, who was only authorized to execute a chattel mortgage, will not bind his principal, and if disaffirmed by him the sale will be construed, in favor of the purchaser, as a mere security for the return of the purchase-money to the use of the principal.¹ When a party mortgages property to an agent, in order to procure credit from the principal, the agent may foreclose the mortgage as the trustee of the principal.² By bringing suit to recover the value of goods mortgaged by an agent, the principal, claiming to hold them under a mortgage taken by the agent, ratifies the action of his agent in taking the mortgage in the principal's name.³

Where an agent's authority to renew and take security for notes owed by his principal is unrestricted, an alteration in a chattel mortgage, made by the agent after delivery, by inserting other property of the mortgagor, is an act in the line of his agency, and will avoid the mortgage. In making this alteration he acted for the principal or mortgagee.⁴ While such alteration was not contemplated by his instructions as agent, yet it was not forbidden, and operated as a legal fraud upon the mortgagor. It was in the line of his agency and because of it;⁵ and when the mortgagee received the instrument from his agent he took it subject to all defects and defenses which the acts of his agent caused or authorized, and the fact that the principal did not know of the alterations, is immaterial.⁶

§ 106. **Corporations.**—The power of a corporation to mortgage its property is dependent upon the general right of disposal which it may possess. Where this right exists, the

¹ *Coppage v. Barnett*, 34 Miss. 621.

² *Varney v. Hawes*, 68 Me. 442.

³ *Partridge v. White*, 59 Me. 564.

⁴ *Hollingsworth v. Holbrook* (Iowa), 45 N. W. Rep. 561.

⁵ *Mechem on Ag.* § 739; *Reynolds v. Witte*, 13 S. Car. 5.

⁶ *Eadie v. Ashbaugh*, 44 Iowa 519; *Farrar v. Peterson*, 52 Iowa 420.

power must necessarily follow.¹ Where the charter of a private corporation granted to the company "all the powers incident and useful to a corporation," it was held that the language was broad enough to include the power to make a chattel mortgage of property purchased by it for the price.²

An instrument purporting throughout the body thereof to be a mortgage of personal property by the corporation, is not invalid as such, because signed by the president only, with his name and title, and sealed with his individual seal.³ It is not necessary that the authority to mortgage corporation property be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, may properly be regarded the act of the corporation.⁴

When one professing to be authorized, mortgages personal property of a corporation in order to procure a loan, and this money is given to the corporation, and to be retained by it, this is sufficient evidence of ratification of the mortgage.⁵

The execution of a chattel mortgage by the president and secretary of a corporation, who were at the time owners of two-thirds of its stock, and its subsequent filing in the clerk's office of the proper county, is a substantial compliance with the statute requiring that the assent of stockholders owning at least two-thirds of the capital of such corporation, to execute the mortgage, should be first filed in the office of the clerk of the county where the mortgaged premises are situated.⁶

¹*Ellis v. Boston, &c.*, 107 Mass. 1; *Reynolds v. Stark Co.*, 5 Ohio 205; *Burt v. Rattle*, 31 Ohio St. 116; *Jackson v. Brown*, 5 Wend. (N. Y.) 590; *Gordon v. Preston*, 1 Watts (Pa.) 385; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *State v. Rice*, 63 Ala. 85; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *West v. Madison Agricultural Board*, 82 Ill. 205; *Pierce v. Emery*, 32 N. H. 484; *Shaw v. Bill*, 95 U. S. 10; *Jones v. Guaranty, &c.*, 101 U. S. 622; *Thompson v. Lambert*, 44 Iowa 239; *Watts' Appeal*, 78 Pa. St. 370.

²*Badger v. Batavia Paper Co.*, 70 Ill. 302.

³*Sherman v. Fitch*, 98 Mass. 59.

⁴*Emerson v. Providence Hat Manf. Co.*, 12 Mass. 237; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158; *Lester v. Webb*, 1 Allen (Mass.) 34.

⁵*Despatch Line of Packets v. Bellamy Manf. Co.*, 12 N. H. 205.

⁶*Armerman v. Wiles*, 24 N. J. Eq. 13.

ARTICLE III.—CONSIDERATION.

- 107. Sufficiency.
- 108. Future Advances.
- 109. When the Amount of the Debt is not Stated.
- 110. To Secure a Pre-existing Debt.
- 111. No Present Indebtedness Subsisting.
- 112. New York Doctrine.
- 113. Identification of the Instrument.
- 114. Parol Evidence—When Admissible.

§ 107. **Sufficiency.**—Like all other contracts, a mortgage must be supported by a sufficient and valid consideration. Thus, where a purchaser of chattels, holding under a conditional contract, makes default, and the vendor waives his right to take possession and extends the time of payment, such act of the vendor is a valid consideration for a chattel mortgage executed on other property by the vendee.¹

In an action to recover a chattel by the mortgagee, whose mortgage was executed and recorded prior to a judgment under which a party claims as execution purchaser, there being no evidence of debt to him, the mortgagee need not show the debt to uphold the mortgage.²

The fact that a mortgage is given slightly in excess of the real debt is not sufficient to stamp it with fraud, when there is no actual fraud intended by the parties to the mortgage.³

In Michigan a chattel mortgage given for a *bona fide* indebtedness is valid, although the mortgage was given by the debtor with intent to defraud his creditors, and the preferred debtor knew of such intent.⁴

If a mortgage is given upon a stock of goods to secure an existing indebtedness, the time for the payment thereof is not extended, but the mortgagee goes into possession under an agreement that the property shall be sold in the usual

¹ Sinker v. Green, 113 Ind. 264.

² Tompkins v. Henderson, 83 Ala. 391.

³ Van Patten v. Thompson, 73 Iowa 103.

⁴ Eureka Steel Works v. Bresnahan, 66 Mich. 489.

course of business, it is valid and is not without a present consideration.¹

The fact that a chattel mortgage includes property recently purchased on credit, in the usual course of business, does not make the mortgage invalid.² But a chattel mortgage to secure a note for a large sum and short time, and a note for \$1 on much longer time, is not *bona fide*, and is made to prevent the seizure of the chattels by creditors.³

A party purchased goods and gave his note for them. In order to give security he induced another to sign the note as surety, and promised him a mortgage on the goods as security, and agreed that, until such mortgage was executed, the surety should have a lien on the goods. Afterwards the vendee mortgaged the goods to a third party, and soon after left the State without executing a mortgage to his surety as agreed. The third party, in consideration of the surety releasing his claim on the goods, mortgaged other property to the surety to secure him from liability on the notes which he signed at first. This was adjudged a good consideration.⁴ So, it is a good consideration where a first mortgagee promised to pay the lien of a second mortgage, provided the mortgagor would deliver him the property; it was a valid agreement, which the second mortgagee might enforce.⁵

§ 108. **Future Advances.**—Much diversity of view exists with courts and law-writers on the question of the validity of mortgages for future advances, and the rights of mortgagees in such mortgages as against purchasers and junior incumbrancers of the mortgaged property. "Some hold that a mortgage which does not specify that for which it is given so distinctly as to give definite information, on the face of the mortgage, of what it secures, so as to render it unnecessary for the inquirer to look beyond the mortgage and

¹ Clark v. Barnes, 72 Iowa 563.

² Lippincott v. Shaw Carriage Co., 25 Fed. Rep. 577.

³ Hixon v. Mullikin, 18 Ill. App. 232.

⁴ Sparks v. Wilson, 22 Nebr. 112.

⁵ Pulliam v. Adamson, 43 Minn. 511.

seek information *aliunde*, is void as against creditors and purchasers. Others hold that a mortgage for future advances is valid as to all advances made under it before notice by the mortgagee of the supervening rights of purchasers or incumbrancers. Others hold that a mortgage for future advances to be made or liability to be incurred, when duly recorded, is valid as a security for indebtedness incurred under it, in accordance with its terms. Then there has been modifications of these views, and a distinction has been drawn between mortgages in which the mortgagee is obligated to advance a given sum, and those in which he is not so bound. The adjudications upon this question are conflicting."¹

Between the parties to the instrument there is no question as to its validity. A mortgage or conditional sale of chattels to be acquired in the future may be valid between the parties thereto;² and so, a chattel mortgage to secure a debt to be subsequently contracted, is valid between the mortgagor and the mortgagee and their privies.³

It is also held by some courts that a chattel mortgage can be extended to cover advances in contemplation at the time of the execution, and such action is valid as against creditors of such mortgagors. But advances under verbal agreement, subsequent to the execution of the mortgage, are not good.⁴

In New York the question cannot be regarded as settled. There are numerous cases holding that a mortgage, judgment or other security may be taken and held for future advances or responsibilities. It is held that a mortgage given to secure future advances, which the mortgagee has the option to make or not, as he chooses, is, as to advances

¹Witczinski v. Everman, 51 Miss. 841.

²Ludwig v. Kipp, 20 Hun (N. Y.) 265.

³Steiner v. McCall, 61 Ala. 406.

⁴Sims v. Mead, 29 Kans. 124; Brown v. Kiefer, 71 N. Y. 610; Adams v. Wheeler, 10 Pick. (Mass.) 199; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270; Hyde v. Shank, 77 Mich. 517; Jones v. Smith, 2 Ves. Jr. 372; Demainburg v. Metcalf, 2 Vernon 698; James v. Morey, 2 Cow. (N. Y.) 246; United States v. Hooe, 3 Cranch 73.

made upon it, to be regarded as a fresh mortgage, and is, as to such advances, subject to the lien of all incumbrances which are duly recorded at the time it is made, whether the mortgagee has notice of them or not. In those cases in which the mortgagee is bound to make future advances, this rule does not apply.¹ Numerous decisions hold that, under the registry system, judgments docketed or mortgages recorded take precedence of all advances or instruments made after they were entered, as such instruments are subsequent incumbrances and give due notice.²

A mortgage to secure future advances which are optional, does not take effect between the parties as mortgage or incumbrance until some advance has been made; if not made until after another mortgage or incumbrance has been made and recorded, it is, in fact, as to such after-advance, a subsequent and not a prior incumbrance; the record of the subsequent mortgage is notice as to such after-advances, as much as if the mortgage first recorded had not been executed only after such advances were made.³

In Vermont there is a different rule, founded upon English authority, which has been abandoned in England. It is held in that State that express notice of a subsequent incumbrance is required in order to stop further advances upon the mortgage, to secure future advances, and, in addition to this, a formal protest against the first mortgagee continuing to increase the indebtedness under his mortgage.⁴

In Alabama, where a note and chattel mortgage to secure it were given for supplies obtained for the declared purpose of maturing a crop, the mortgage providing that if the mortgagee should advance additional supplies, the mortgage should stand as security for them, as fully as if included in

¹Ackerman v. Hunsicker, 21 Hun (N. Y.) 53.

²Spader v. Lawler, 17 Ohio 371; Ter-Hoven v. Kerns, 2 Pa. St. 96; McLure v. Roman, 52 Pa. St. 458; Parker v. Jacoby, 3 Grant (Pa.) 300; Boswell v. Goodwin, 31 Conn. 74; Hartley v. Kirlin, 45 Pa. St. 49.

³Ter-Hoven v. Kerns, 2 Pa. St. 96.

⁴McDaniels v. Colon, 16 Vt. 300.

the note, then the mortgage will include such advances or supplies for planting, cultivating and gathering the crop, though such advances were after maturity of mortgage. Judge Somerville says the note and mortgage were executed in April of the year 1880, and the supplies gotten by the mortgagor were obtained for the declared purpose of making a crop. Whatever supplies or advances, therefore, which were shown to have been obtained to aid in making the crop for the current year, that is, in cultivating and gathering it, must be construed to come within the terms of the mortgage.¹

§ 109. **When the Amount of the Debt is Not Stated.**—Upon this question also there is an irreconcilable conflict of authority. In Mississippi it is not necessary for a mortgage to secure future advances to specify any particular or definite sum which it is to secure. It is not necessary for it to be so completely certain as to preclude the necessity of all extraneous inquiry. If the mortgage contains enough to show a contract, that it is to stand as a security to the mortgagee for such indebtedness as may arise from future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry; and if he fails to make it, he cannot claim protection as a *bona fide* purchaser. Judge Campbell ably holds that the law requires mortgages to be recorded for the protection of creditors and purchasers, and if it gives information that it is to stand as a security for all future indebtedness to accrue from the mortgagor to the mortgagee, all are put upon inquiry as to the state of dealings between the parties, and the amount of indebtedness covered by the mortgage, and are duly advised of the rights of the mortgagee to hold the mortgaged property as a security for such indebtedness as may accrue to him. “Thus informed, it is folly of any one to buy the mortgaged property, or take a mortgage on it, or give credit on it, and if he does so, his claim must be subordinate to the paramount

¹ *Hill v. Nelms*, 86 Ala. 442. See, also, *Collier v. Faulk*, 69 Ala. 58; *Lovell v. Webb*, 62 Ala. 271.

right of the senior mortgagee, who in thus securing himself by mortgage, and filing it for record, as required by law, has advertised the world of his paramount claim on the property covered by his mortgage, and is entitled to advance money and extend the credit according to the terms of his contract thus made with the mortgagor, who cannot complain, for such is his contract; and third persons afterwards dealing with him, cannot be heard to complain, for they are affected with full notice, by the record, of what has been agreed on by the mortgagor and mortgagee.”¹

In some States the statute requires a definite amount to be stated or fixed in the mortgage, which must be followed. Chief Justice English says mortgages to secure future advances have always been favored by the common law. The statute requiring the amount to be fixed, is a modification of the common law, under which the mortgage would be equally valid without such limitation, and a mortgage to secure indefinite future advances is valid as against third parties.²

So, it is held in Georgia that a mortgage made in consideration of advances in money and plantation supplies, to be furnished for the purpose of carrying on a farm for a certain year, no sum being named, is valid, notwithstanding a statute requiring a mortgage to specify the debt which it is given to secure.³

§ 110. **To Secure a Pre-existing Debt.**—One’s own debt, though past due, is always a sufficient consideration to support his chattel mortgage to the creditor to secure the debt, and, as to parties and privies, is as effectual as if made upon an adequate new consideration. Thus, a mortgage conditioned for the payment of all sums due and to become due, is sufficiently certain, and the mortgage is valid. The clause relating to past indebtedness must be brought within the

¹ *Witczinski v. Everman*, 51 Miss. 841. See, also, *Robinson v. Williams*, 22 N. Y. 380; *Stoughton v. Pasco*, 5 Conn. 442.

² *Jarrett v. McDaniel*, 32 Ark. 598. See *La Due v. Railroad Co.*, 13 Mich. 380; *Birnie v. Main*, 29 Ark. 591.

³ *Allen v. Lathrop*, 46 Ga. 133.

terms of the defeasance, in order to make it effectual; and when this appears to have been the intention of the parties, this construction will give effect to every part of the instrument, but the excluding past indebtedness will not comply with the law upon this subject.

No cases can be found in which a man's own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from the debtor.¹

§ 111. **No Present Indebtedness Subsisting.**—Judgments and mortgages may be taken to secure future advances, though no present indebtedness is subsisting between the parties at the time of their rendition.²

In Alabama, a note and mortgage are valid, where they are given for supplies obtained for the declared purpose of making a crop, and the mortgage providing that the mortgagee should advance additional supplies, the mortgage standing as security for them as fully as if included in the note. The mortgage included advances or supplies for planting, cultivating and gathering the crop, though made after it had become due.

And any verbal mortgage to cover or include other debts created, to be made in the future, would be good as a verbal mortgage of the property designated.³

§ 112. **New York Doctrine.**—Where a mortgage is given to secure a prior liability, the mortgagee is not a *bona fide* purchaser for a valuable consideration, as against one from whom the mortgagor obtained the property by fraud.

A pre-existing indebtedness in New York repels the idea that the mortgagee is a *bona fide* party to the transaction.

¹Turner v. McFee, 61 Ala. 468; Machette v. Wanless, 1 Colo. 225; Paine v. Benton, 32 Wis. 491; Smith v. Worman, 19 Ohio St. 145; Kranert v. Simon, 65 Ill. 344.

²Conrad v. Atl. Ins. Co., 1 Pet. (U. S.) 386; Leeds v. Cameron, 3 Sumn. C. 488; Hubbard v. Savage, 8 Conn. 215; Walker v. Snediker, 1 Hoff. Ch. (N. Y.) 145; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270; Monnell v. Smith, 5 Cow. (N. Y.) 441; Lyle v. Ducomb, 5 Binn. (Pa.) 585; Livingston v. McInlay, 16 Johns. (N. Y.) 165.

³Hill v. Nelms, 86 Ala. 442.

Such mortgagee acquires no title or lien, by virtue of his mortgage, as against the original owner, or vendor, to the mortgagor, because he parts with nothing, nor does he relinquish any security or incur any liability upon the faith of the mortgage.¹

§ 113. **Identification of the Instrument.**—It is enough that the description in the mortgage of the instrument which it is given to secure, states correctly sufficient facts to identify the instrument with reasonable certainty. It is not indispensable that all the particulars of such description should correspond with the instrument. Thus, a mortgage purporting to be given to secure a certain promissory note, made and delivered on or about the 8th day of August, 1867, signed by three persons, payable in or about one year from date, in an action to foreclose, the note produced in evidence was dated August 6th, 1867, signed by the three persons named as makers, and payable on or before September 1st, 1868, having the same amount, and there was a condition inserted that it might be paid by the delivery of a barge in lieu of the money. This was a sufficient identification by the description in the mortgage.² So, a note was described in a mortgage as being for \$236; but the note produced in evidence was for \$256, but corresponded in other respects with the description in the mortgage. This was a sufficient identification, upon the evidence given, which showed that the note produced was the only one which the party had signed as security.³ So, where a condition in the mortgage describes the contract secured as signed by one party, while it was in fact signed by a firm of which the party was a member. This was sufficient.⁴ In a condition to save harmless the mortgagee against a note that he has signed, it is sufficient to describe such note, so that it may be identified.

¹ *Woodburn v. Chamberlain*, 17 Barb. (N. Y.) 446; *Van Slyck v. Foot*, 10 Hun (N. Y.) 554; *Thompson v. Van Vechten*, 27 N. Y. 568.

² *Paine v. Benton*, 32 Wis. 491.

³ *Johns v. Church*, 12 Pick. (Mass.) 557.

⁴ *Robertson v. Stark*, 15 N. H. 109.

The omission of the sum, the date, and the name of one of the signers, is not fatal, if the note is so described as to be identified.¹

Where a mortgage and note secured thereby are made and delivered at the same time, the mortgage is valid, if by mistake dated a year prior to the date of the note.²

§ 114. **Parol Evidence—When Admissible.**—Parol evidence of an erroneous date in a mortgage of personal property, not under seal, is admissible.³ So, where a note agrees in some respects with the description given in the mortgage, though it differs in others, it may be proved by parol evidence to be the one intended in the mortgage.⁴

Parol evidence is competent to show that a promissory note, which conforms to the description in the mortgage in all respects except the year of the date, was the note intended to be secured in the mortgage.⁵

Where two notes were described in the condition of the mortgage, "two notes for \$150 each," one note produced in evidence was for \$150, the other for \$200, but in all other respects they corresponded with the description in the mortgage. Parol evidence was introduced to show that the two notes were the ones described.⁶ So, a note was described in the mortgage as dated in 1824; the note produced was dated 1821. Parol evidence was admissible to show that the note was the one intended to be secured by the mortgage.⁷

In the condition of the mortgage the note was described

¹ *Boody v. Davis*, 20 N. H. 140.

² *Partridge v. Swazey*, 46 Me. 414; *Williams v. Hilton*, 35 Me. 547; *Bourne v. Littlefield*, 29 Me. 302; and see *Hurd v. Robinson*, 11 Ohio St. 232; *Merchants National Bank v. Raymond*, 27 Wis. 567; *Youngs v. Wilson*, 27 N. Y. 351; *Merrills v. Swift*, 18 Conn. 257; *Hough v. Bailey*, 32 Conn. 288; *Michigan Ins. Co. v. Brown*, 11 Mich. 266; *Robinson v. Williams*, 22 N. Y. 380; *Nelson v. Boyce*, 7 J. J. Marsh. (Ky.) 401.

³ *Partridge v. Swazey*, 46 Me. 414.

⁴ *Shirras v. Caig*, 7 Cranch (U. S.) 34; *Boody v. Davis*, 20 N. H. 147; *Hurd v. Robinson*, 11 Ohio St. 232; *Johns v. Church*, 12 Pick. (Mass.) 557; *McKinster v. Babcock*, 26 N. Y. 378; *Pierce v. Parker*, 4 Met. (Mass.) 80; *Melvin v. Fellows*, 33 N. H. 401; *Cushman v. Luther*, 53 N. H. 562.

⁵ *Clark v. Houghton*, 12 Gray (Mass.) 38.

⁶ *Cushman v. Luther*, 53 N. H. 562.

⁷ *Sweetser v. Lowell*, 33 Me. 446.

as payable to a firm. The note proved was made payable to an individual. Parol evidence was introduced to prove that this note was the one secured by the mortgage.¹

A chattel mortgage will be sustained when parol evidence shows that its real consideration was the indorsement by the mortgagor to the mortgagee of notes for \$1,000, for accommodation of the latter, and upon his failure to raise the money thereon, two notes for \$500 were substituted in its place, although the consideration stated in the mortgage was a present absolute indebtedness of \$1,000, though no such indebtedness existed, and no money was advanced. In such case evidence is admissible that the mortgagee indorsed the substituted notes of \$500 in reliance upon the mortgage as security therefor, and that it was the purpose of the mortgage to secure such substituted liability.²

ARTICLE IV.—STIPULATIONS—CONSTRUCTION.

115. Construction of Agreements to Insure.

116. New York Rule.

117. Wisconsin Rule.

118. Release of Part of the Property—Discharge of Lien.

119. Meaning of a Mortgagor's Covenant.

§ 115. **Construction of Agreements to Insure.**—When the mortgage contains a covenant to insure, and is not kept by the mortgagor, the mortgagee may properly insure the chattels, and then add the premiums to the debt, if fair and reasonable.³

The word “due” in a stipulation contained in a mortgage of personalty, providing for insurance for the mortgagee's

¹ *Williams v. Hilton*, 35 Me. 547. See, also, to the same effect, *Hall v. Tufts*, 18 Pick. (Mass.) 455; *Pierce v. Parker*, 4 Met. (Mass.) 80; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13.

² *McKinster v. Babcock*, 26 N. Y. 378. When a chattel mortgage appears by its terms to have been given to a second indorser of two notes to secure their payment, it may be shown by parol evidence that it was intended as a security for all the indorsements upon the notes, and upon such proof being made, it can be enforced by the first indorser. *Bainbridge v. Richmond*, 17 Hun (N. Y.) 391.

³ *Leland v. Colver*, 34 Mich. 418.

benefit, in a sum equal to the full amount due on the mortgage, is construed to be synonymous with "owing," and contemplates insurance on the amount remaining unpaid.¹

Parties insured property that was mortgaged, and by a memorandum upon the policy agreed to pay the amount of the insurance to the mortgagee in case of loss, with the consent of the mortgagor. The mortgage was afterwards foreclosed without any act of the mortgagor to whom the policy was issued; held, that this did not work an alienation of the property so as to defeat the policy.²

After the delivery of the policy, the mortgagor, without the consent of the company, which was one of the conditions, gave a chattel mortgage upon four cows which were covered by the policy. The policy provided that if the property shall be sold or conveyed, or if the interest of the parties shall be sold or conveyed, or if the interests of the parties therein changed in any manner, whether by act of the parties or by operation of law, or if the property shall become incumbered by mortgage, judgment or otherwise, * * * then, and in every case, the policy shall be null and void, unless the written consent of the company at the home office is obtained. This rendered the policy as to the cows void.³

A chattel mortgage on certain buildings in course of erection and upon the leasehold, and an assignment of the lease, and a contract between the parties in relation to the subject-matter, were executed on the same day; in determining the rights of the parties thereunder, these transactions were properly construed together.⁴

§ 116. **New York Rule.**—It is settled law in this State that an assignment of a policy by the assured to his mortgagee, with the express consent of his insurers, will enable

¹ *Fowler v. Hoffman*, 31 Mich. 215.

² *Bragg v. New Eng. Fire Ins. Co.*, 25 N. H. 289.

³ *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.) 83; *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447.

⁴ *Edling v. Bradford* (Nebr.), 46 N. W. Rep. 886.

the mortgagee to recover, in case of loss, although the assured may have done acts which, by the terms of the policy, render it void. And a policy which, by its terms, declares that the loss, if any, shall be payable to the mortgagee, is an equally effective protection of his interest.¹

§ 117. **Wisconsin Rule.**—It is settled in this State that the mortgagee of chattels has the legal title of the property before the debt is due, and that he may take immediate possession thereof, unless, by express stipulation, the mortgagor is permitted to retain possession. So, a provision in a policy of insurance issued to the chattel mortgagor, by which any loss is payable to the mortgagee, as his interest may appear, is valid. Judge Cole says that the legal title of this policy vested upon its execution in the mortgagee, as fully as if it had been subsequently assigned to him.² He says this view is not precisely the view taken in Massachusetts,³ but is not essentially different.

§ 118. **Release of Part of the Property—Discharge of Lien.**—The parties to a mortgage can make a valid agreement to have the lien divested on one part of the mortgaged property on payment of the debt *pro tanto*. Thus, a party sold his interest in a farm, stock and farming tools, receiving a mortgage and five eight-hundred-dollar notes, payable annually. The mortgagee had the first lien of the crops until \$800 and interest were paid. The said lien was not to be enforced in any way until after the said \$800 is due and unpaid; that when the \$800 and interest are paid, the said mortgagee is to release the security upon the live stock before described in the mortgage, and when the further sum of \$200 is paid, the said mortgagee is to release the security upon the tools before described—meaning that the payment of said

¹ *Grosvenor v. Ins. Co.*, 5 Duer (N. Y.) 517; *Ennis v. Ins. Co.*, 3 Bosw. (N. Y.) 516; *Robert v. Ins. Co.*, 9 Wend. (N. Y.) 406.

² *The Apple on Ins. Co. v. The British Am. Assur. Co.*, 46 Wis. 23; and see *Grosvenor v. Ins. Co.*, 17 N. Y. 391.

³ *Barrett v. Fire Ins. Co.*, 7 Cush. 175; *Lowell v. Fire Ins. Co.*, 8 Cush. 127; *Fogg v. Fire Ins. Co.*, 10 Cush. 337; *Hale v. Fire Ins. Co.*, 6 Gray 169; *Loring v. Ins. Co.*, 8 Gray 28.

sums of \$800 and \$200 is to operate as a release of the said live stock and tools. The court interpreted this, that when the first \$800 of said purchase-money, and the interest thereon, were paid, the lien of the live stock was discharged.¹

The parties to a chattel mortgage executed an agreement that if the mortgagor should sell any of the property the mortgagee would discharge the claim of the amount upon the receipt of the money therefor. It was held that this agreement was conditional, and gave no authority to the mortgagor to divest the mortgagee's interest in the property by sale, except upon a performance of the condition by paying the purchase-money to the mortgagee.²

§ 119. **The Meaning of a Mortgagor's Covenant.**—When a mortgagor gives a mortgage and covenants in it forever to warrant and defend the property mortgaged, this covenant will be construed as a mere covenant of title, and not a covenant that he will forever keep and protect the property.³

ARTICLE V.—PROPERTY COVERED.

- 120. Conveying Terms Construed.
- 121. Goods—Definition.
- 122. Natural Increase of Live Stock.
- 123. When the Natural Increase is Not Covered.
- 124. Accessions to Unfinished Articles.
- 125. When Repairs are Included.
- 126. Intermingling Mortgaged Chattels.
- 127. Substituting One Chattel for Another.
- 128. Replacing Goods Sold.
- 129. Exchanging Articles by Consent.
- 130. As to Third Persons.
- 131. Cuttings From Plants and Trees.
- 132. Parol Evidence to Fix the Quantity.

§ 120. **Conveying Terms Construed.**—It is necessary that the property covered shall be clearly set out in the mort-

¹Brigham v. Avery, 48 Vt. 602.

²Whitney v. Heywood, 6 Cush. (Mass.) 82. See, also, Fogg v. Fire Ins. Co., 10 Cush. (Mass.) 337; Barrett v. Fire Ins. Co., 7 Cush. (Mass.) 175; Lowell v. Fire Ins. Co., 8 Cush. (Mass.) 127; Hale v. Fire Ins. Co., 6 Gray (Mass.) 169; Loring v. Ins. Co., 8 Gray (Mass.) 28.

³Weed v. Covill, 14 Barb. (N. Y.) 242.

gage, and be in such a state that it can be mortgaged. Thus, in a chattel mortgage, certain naval stores were referred to which were not then in existence. Simply declaring a lien, and covenanting to ship to the mortgagee material made by the mortgagor during a certain year, but no words denoting a conveyance or transfer appearing, these stores were not legally mortgaged, and therefore not necessarily applicable to pay the mortgage debt.¹ So, a mortgage of a horse, providing that the mortgage shall cover earnings of the horse, whether by premiums or otherwise, does not cover premiums earned after the execution of the mortgage.²

Several chattel mortgages were given, known as "crib receipts," to secure money advanced by a commission firm, under arrangements for the purchase of corn by the mortgagor on speculation. This corn was to be consigned to and sold by the mortgagees. The mortgage covered the corn in the particular crib, and was conditioned to be void on the payment by the mortgagor, by a certain day, all moneys and accounts due, including commissions on the above-described corn, and on other grain, which the mortgagor agreed to consign and to pay commission on. In this case each receipt was given, not merely as security for the corn in the crib which it especially designated, but for all advances made by the mortgagees in pursuance of the adventure, including margins advanced, or sales of corn for future delivery in excess of the amount which they possessed, and the mortgage was not restricted by the word "due" to securing only indebtedness at the time before the date indicated, but would secure any outlay made by the mortgagees in good faith, in pursuance of or to protect the enterprise.³

An assignee took a mortgage given to secure \$313.50, and, in a contest to collect the whole amount, it was shown that he only, in fact, paid \$40 for the assignment. It was shown that the understanding between the parties to the mortgage

¹ Whilden v. Pearce, 27 S. Car. 44.

² McArthur v. Garman, 71 Iowa 34.

³ Douglass v. Smith, 74 Iowa 468.

was, that upon payment of the \$40 the mortgage should be released, and that the assignee knew of this understanding. Under this condition of facts, the assignee could not be allowed to set up the mortgage and claim the whole amount which it was given to secure.¹

A mortgage was taken on a stock of goods, and, at the time of its execution, only \$1,000 was advanced, but the balance soon after and before the mortgagee took possession; held, that it was valid for the full amount.²

A mortgage executed to secure any sums that may become due for supplies to be furnished by the mortgagee to the mortgagor before a certain date following, does not secure an account contracted by the mortgagor after said date.³ Nor can the intention of the parties to a chattel mortgage be invoked to apply the mortgaged property not known to them when the mortgage was made.⁴

A mortgage on a stock of goods, and on all fixtures and utensils in the store, covers an iron safe, show-cases, platform scales, a truck, cheese-case and chandeliers.⁵ And a mortgage of all the furniture, lumber and materials in a factory, and all furniture hereafter manufactured in said factory, will cover furniture manufactured there out of said material and lumber.⁶ A piano, billiard table and paintings will be included in a mortgage of all the furniture in a certain house.⁷ But whether the machinery of a mill is included in a purchase-money mortgage may be determined by the intention of the parties as shown by their conduct, and the circumstances of the case.⁸

A horse cannot be deemed to be embraced in the description, "all goods, wares, merchandise, household furniture, fixtures or other property" on certain premises.⁹ Nor can

¹ *Ganong v. Green*, 64 Mich. 488.

² *McCord v. Burson*, 38 Kans. 278.

³ *Fort v. Black*, 50 Ark. 256.

⁴ *Cass v. Gunnison*, 58 Mich. 108.

⁵ *McCall v. Walter*, 71 Ga. 287.

⁶ *Dehority v. Paxson*, 97 Ind. 253.

⁷ *Sumner v. Blakslee*, 59 N. H. 242; 47 Am. Dec. 196.

⁸ *Price v. Jenks*, 14 Phila. (Pa.) 223.

⁹ *Kuschell v. Campau*, 49 Mich. 34.

a mortgage of "groceries" contained in a country store include pails, shovels and the like, although such goods are usually kept in such a store.¹ Nor will a chattel mortgage cover wagons and teams used by the mortgagor for the delivery of goods from the store, when its terms include "fixtures, furniture and appliances used in and about the carrying on of" a certain store.²

A purchase-money mortgage on a pregnant mare covers the colt, unless it is weaned before the maturity of the mortgage.³

§ 121. **Goods—Definition.**—The word "goods," as used in mortgages, includes all chattels, both real and personal.⁴ The corresponding Norman-French term, "*biens*," is said to include property of every description except estates of freehold.⁵ The lien, when the term includes all "goods, implements, stocks, fixtures, tools and other personal property which may be put on said premises," includes the hay and crops. Farm produce may be properly said to be "put" upon the premises. The word "put," in a general sense, means simply to "lay or place." When crops are planted they are "put" upon the premises. This is true of hay, although, while in the form of growing grass, it was part of the realty.⁶

§ 122. **Natural Increase of Live Stock.**—*Partus sequitur ventrem* is a well-known maxim of the law, giving the offspring to the owner of the dam. So, the increase of live stock is covered by a chattel mortgage on the dam, and a party purchasing such increase before the expiration of the mortgage, acquires no greater rights than the mortgagor had.⁷

¹ *Fletcher v. Powers*, 131 Mass. 333.

² *Van Patten v. Leonard*, 55 Iowa 520.

³ *Kellogg v. Loveley*, 46 Mich. 131; 41 Am. Rep. 151.

⁴ *Coke Litt.* 118b; *Williams on Per. Property* 2.

⁵ *Bouvier's L. Dict.*, title "*Biens*."

⁶ *McCaffrey v. Woodin*, 65 N. Y. 459.

⁷ *Cahoon v. Miers*, 67 Md. 573; *Gundy v. Biteler*, 6 Ill. App. 510; *Meyer v. Cook*, 85 Ala. 417; *Evans v. Merriken*, 8 Gill & J. (Md.) 39; *Hughes v. Graves*, 1 Litt. (Ky.) 317; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195; *Fonville v. Casey*, 1 Murph. (N. Car.) 389.

Thus, a vendee of a mare on credit, who gives back a chattel mortgage for the entire purchase price, cannot keep the colt which the mare bears after sale, if he makes a default in the payment and the mare is taken on the mortgage.¹ An agreement in writing for the owner of a mare to pay to the owner of a stallion \$20 in twelve months, if the mare should get with foal—"colt holden for payment"—creates a lien in the nature of a mortgage, as the chattel has a potential existence.²

And, generally, the lien of property retained by the vendor covers all of its natural incidents and accessories, unless circumstances show a different intention.³ The produce or increase of stock mortgaged, is subject to the mortgage. It is an incident following the condition.⁴

§ 123. **When the Natural Increase is Not Covered.**—While a mortgage on the pregnant dam covers the offspring without naming it in the terms of the mortgage, yet the mortgage lien cannot reasonably be supposed to follow it after maturity and separation from its dam. Thus, two cows were mortgaged and kept in possession by the mortgagor. While in his possession, and before the mortgage expired, each cow gave birth to a calf. At the age of eighteen months the mortgagor sold these calves. The court held that, as it was not shown that the mortgage, by its terms, covered the calves, the purchaser, therefore, had no notice of the claim of the mortgagee that the mortgage covered the two calves, and hence the sale was valid.

This decision seemed to turn on the fact that "the time had passed when it was necessary for their nurture to permit them to follow the cows. At such time it is unnatural to

¹ *Kellogg v. Loveley*, 46 Mich. 131; *Arnold v. Stock*, 81 Ill. 407.

² *Sawyer v. Gerrish*, 70 Me. 254; *Farrar v. Smith*, 64 Me. 74; *Oakes v. Moore*, 24 Me. 214.

³ *Dunham v. Chaslin*, 14 Eng. 418; *Evans v. Merriken*, 8 Gill & J. (Md.) 39; *Fowler v. Merrill*, 11 How. (U. S.) 375.

⁴ *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Funk v. Paul*, 64 Wis. 35; *Boggs v. Stankey*, 13 Nebr. 400; *Leavitt v. Jones*, 54 Vt. 423; *Dyer v. State*, 88 Ala. 225.

separate the calf from its dam, when it is not taken to the butcher." After nurture and separation, and sale of the offspring, there is no notice to the purchaser, unless the offspring is named and described in the mortgage.¹

§ 124. **Accessions to Unfinished Articles.**—The materials used in finishing a mortgaged article in possession of the mortgagor are embraced in the mortgage, and the mortgagee is entitled to the additional value derived from the materials as well as the labor of the mortgagor. Thus, an unfinished engine was mortgaged and subsequently finished by the mortgagor out of materials also covered by the mortgage; Chief Justice Greene, speaking for the court, held that the mortgagee was entitled to the additional value derived from said materials and the labor of the mortgagor.² The articles, however, should remain substantially the same. Judge Dewey, in delivering the opinion of the court, says that when unfinished articles of manufacture are mortgaged, and the mortgagor afterwards adds labor and material to them, the mortgagee will hold them, as against third persons, if they remain substantially the same; "and if such identity was continued, additions not making an important part of its whole present value, would not divest the mortgagee of his interest."³

The doctrine has been held still stronger than this; which is, that an attaching creditor cannot hold the shoes manufactured from mortgaged leather.⁴

Judge Merrick holds, in consonance with this doctrine, that cucumbers in bulk and in salt, at the time when a mortgage thereof is executed, are not so substantially changed or intermingled with other property by being subsequently "greened," and put into bottles and vinegar, which are not

¹ *Winter v. Landphere*, 42 Iowa 471; *Thorpe v. Cowles*, 55 Iowa 408. See, also, *Funk v. Paul*, 64 Wis. 35; *Kellogg v. Loveley*, 46 Mich. 131.

² *Jenckes v. Goffe*, 1 R. I. 511. See, also, *Woods v. Russell*, 5 B. & Ald. 310.

³ *Harding v. Coburn*, 12 Met. (Mass.) 333; *Ex parte Ames*, 1 Lowell D. C. 561.

⁴ *Putnam v. Cushing*, 10 Gray (Mass.) 334.

included in the mortgage, as to render the attachment of them lawful and effectual against the mortgagee.¹

So, when a debtor mortgaged a number of unfinished pruning shears, and afterwards finished the shears, and thereby greatly added to their value, it did not invalidate the mortgage, and the mortgagee was fully protected against third persons.

The court concludes an able argument in this language, which is the correct doctrine: "In case materials were mortgaged by a particular description, and, with the assent of the mortgagee, were manufactured into articles not answering to that description, and so changed that with reasonable diligence a creditor could not know that they were the same, if he should, without actual notice of the claim under the mortgage, attach them for the debt of the mortgagor, it would deserve serious attention, whether, under our statute requiring mortgages of personal property to be registered, the mortgagee could hold against the attaching creditor.

"But if the mortgagor, after the mortgage, add to the value of the mortgaged property, no matter how much, the added value, as between mortgagor and mortgagee, goes to increase the security. This is a familiar rule in mortgages of land, and we see no reason why the principle should not apply with equal force to mortgages of personal property. If the mortgage is fair and fairly used no creditor of the mortgagor has just ground of complaint. * * * But in absence of fraud it does not occur to me that a creditor of the mortgagor has any good reason to complain that the labor or materials of the mortgagor have been incorporated with the property originally mortgaged."²

§ 125. **When Repairs are Included.**—A rifle having a skeleton stock at the time when the mortgage thereof was executed, is not so substantially changed, by having a new

¹ Crosby v. Baker, 6 Allen (Mass.) 295.

² Perry v. Pettengill, 33 N. H. 433. See, also, Glover v. Austin, 6 Pick. (Mass.) 209; Sumner v. Hamlet, 12 Pick. (Mass.) 76; Eaton v. Lynde, 15 Mass. 241; Willard v. Rice, 11 Met. (Mass.) 493; Pulcifer v. Page, 32 Me. 404; Babcock v. Gill, 10 Johns. (N. Y.) 287; Dunning v. Stearns, 9 Barb. (N. Y.) 630.

wooden stock and a new and different kind of lock substituted for the original ones, by way of repairs, as to authorize an attaching creditor of the mortgagor to hold the same against the mortgagee, provided it is capable of being identified.¹

New printing material, purchased after giving a chattel mortgage on the printing establishment, to supply the wear, decay and destruction of the old, and which has been so intermingled with the old stock as not to be readily distinguished, would be included in the mortgage and become a part of the mortgaged property by accession; but if kept separate, so as to be readily distinguished, it would not be thus included.² If a mortgagor removes old sails from a ship and substitutes new sails, the latter will go with the ship if taken under mortgage.³

§ 126. **Intermingling Mortgaged Chattels.**—If a mortgagor of goods mixes them purposely or carelessly with his own, and sells the whole, the mortgagee can take them all from the purchaser, in the absence of evidence to distinguish the mortgaged goods from the others.⁴ Or if the goods cannot be distinguished, and the mortgagor consigns them for sale to a third party, who sells them, the mortgagee is entitled to recover of the assignee the value of the whole.⁵ In general, if the intermingling is made purposely or carelessly, the party making the mixture must bear the loss.⁶

§ 127. **Substituting One Chattel for Another.**—If a mort-

¹ *Comins v. Newton*, 10 Allen (Mass.) 518.

² *Fowler v. Hoffman*, 31 Mich. 215. See *Willard v. Rice*, 11 Met. (Mass.) 493; *Loomis v. Green*, 7 Greenl. (Me.) 386; *Barron v. Cobleigh*, 11 N. H. 559; *Wetherbee v. Green*, 22 Mich. 311.

³ *Southworth v. Isham*, 3 Sandf. (N. Y.) 448.

⁴ *Adams v. Wildes*, 107 Mass. 123.

⁵ *Willard v. Rice*, 11 Met. (Mass.) 493.

⁶ *Ward v. Ayre*, Cro. Jac. 366; *Lupton v. White*, 5 Ves. 439; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; *Hathaway v. Ryder*, 2 Pick. (Mass.) 298; *Colvill v. Reeves*, 2 Campb. 576; 2 Shouler's Per. Prop. 46; *Hasseltine v. Stockwell*, 30 Me. 237; *Bryant v. Ware*, 30 Me. 295; *Dunning v. Stearns*, 9 Barb. (N. Y.) 630; *Burns v. Campbell*, 71 Ala. 271; *Huff v. Earl*, 3 Ind. 306; *Eldred v. O'Conto*, 33 Wis. 133; *Schulenberg v. Harriman*, 2 Dill. C. C. 398; *Fuller v. Paige*, 26 Ill. 258; *Simmons v. Jenkins*, 76 Ill. 47.

gagor of chattels belonging to a business establishment, disposes of such articles, and converts them into money, and then buys other articles with the avails, the title of these last will not, by simple operation, vest in the mortgagee. But if they are procured for the same purpose, to supply the place of worn-out articles belonging to the business, and they become attached to and incorporated with it, by the right of accession they follow the title of the displaced chattels.¹ A horse having been mortgaged, was, by consent of the parties, exchanged for a second horse, which was to take its place. Afterwards the mortgagor exchanged the second horse for a third, without the mortgagee's consent or knowledge. It was decided that third parties were not bound by the actions of the parties, unless notice had been brought to their knowledge.² Nothing can be taken in exchange for mortgaged property and by verbal agreement of the parties become substituted for and stand in the place of that which has been included in the mortgage.³ Neither can a chattel mortgage, given to secure a certain indebtedness therein expressed, be so extended as to become a lien for the amount of an award for other and different indebtedness.⁴

§ 128. **Replacing Goods Sold.**—In many of the States, a mortgage cannot cover goods bought to replace those sold. Thus, in Colorado, where it was shown that new goods were purchased and mixed with the original stock from time to time, after the mortgage was executed on the stock, and no testimony established the fact that any portion of the goods seized by an attaching creditor was the same goods mentioned in the mortgage, and the mortgage making no provision for goods afterwards acquired, the attaching creditor can hold the goods attached.⁵

So, in Maryland, a chattel mortgage of goods in a store,

¹ *Holly v. Brown*, 14 Conn. 254.

² *Sharpe v. Pearce*, 74 N. Car. 600.

³ *Rhines v. Phelps*, 3 Gilm. (Ill.) 455.

⁴ *Morris v. Tillson*, 81 Ill. 607.

⁵ *Wilcox v. Jackson*, 7 Colo. 522.

providing for all renewals and substitutions for the same, the object being to include not only the articles then in the store, but whatever may be at any time therein, in the course of the mortgagor's business, cannot convey subsequently-acquired goods so as to give the mortgagee a right of action at law against a party seizing them.¹ So, in Massachusetts, a mortgage was made of all goods in a store, and of all goods which might afterwards be substituted by the mortgagor for those which he then possessed, the mortgagor making sales and substituting other goods of equal value; under this condition the mortgage cannot, at law, apply to goods not in existence, or not capable of being identified at the time it was made, or to goods intended to be afterwards purchased to replace those which were sold.²

§ 129. **Exchanging Articles by Consent.**—The parties to a mortgage, as between themselves, can substitute one article for another and be bound by the contract. Thus, a chattel mortgage was executed on two horses; some months thereafter, by request and consent of the mortgagor, one of the horses was released from the mortgage, and, in lieu thereof, another horse was substituted by interlineation. This was held a valid transaction and passed the title, as between the parties, to the second horse, which was substituted. The general rule, that parties may alter at pleasure their contract after its consummation, applies to deeds and mortgages.³

In Mississippi a party may mortgage all the live stock that he shall own during the coming year, and the mortgage will apply to exchanges, and hold the substituted animal in place of the one traded. Thus, a mortgage was made on an iron-gray horse and all other live stock which the mort-

¹ *Hamilton v. Rogers*, 8 Md. 301.

² *Barnard v. Eaton*, 2 Cush. (Mass.) 294. See, also, *Sharpe v. Pearce*, 74 N. Car. 600; *Chapin v. Cram*, 40 Me. 561; *Williams v. Briggs*, 11 R. I. 476; *Moody v. Wright*, 13 Met. (Mass.) 17; *St. Louis Drug Co. v. Dart*, 7 Mo. App. 590; *Rose v. Bevan*, 10 Md. 466; *Rhines v. Phelps*, 3 Gilm. (Ill.) 455; *Dutcher v. Swartwood*, 15 Hun (N. Y.) 31. The authorities do not agree on the question of sale and replenishment of stock by the mortgagor. See Section 619 *et seq.* for a full discussion of this subject.

³ *Winslow v. Jones*, 88 Ala. 496.

gagor might own during the year. During the specified time the mortgagor exchanged this horse for a second and then exchanged the second for a third, and gave his note for \$118, as the difference in the value of the horses, secured by a mortgage. The court held that the second horse was covered by the mortgage, and also the third horse, if that animal had been a mere exchange for the second; so, the mortgagee had a lien upon the third to the value of the second horse, and therefore ordered that the third horse should be sold and the proceeds, to that extent, applied to the satisfaction of the first mortgage and the balance to the second mortgage.¹

§ 130. **As to Third Persons.**—In Illinois and many other States, as to third parties, there can be no substitution or exchange of property by the parties to the mortgage that will bind third parties, unless the mortgagee takes actual possession of the substituted articles before the rights of third parties intervene.² As between the parties, they may agree to substitute other property for that first mortgaged, which, in equity, gives the mortgagee a lien upon the article substituted.³

§ 131. **Cuttings from Plants and Trees.**—Plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee by accession. These were included in the mortgage. The cuttings are from the plants. The portion secured before severance was subject to mortgage. They are none the less so after severance. The mortgagee loses none of his rights because after severance they remain in the same green-house in the condition for further growth and development.⁴

§ 132. **Parol Evidence to Fix the Quantity.**—Parol evidence is admissible to fix the quantity of property to be mortgaged,

¹ *Davis v. Marx*, 55 Miss. 376; *Marx v. Davis*, 56 Miss. 745.

² *Simmons v. Jenkins*, 76 Ill. 479; *Powers v. Freeman*, 2 Lans. (N. Y.) 127; *Ranlett v. Blodgett*, 17 N. H. 298; *Titus v. Mabey*, 25 Ill. 257.

³ *Simmons v. Jenkins*, 76 Ill. 479; *Bell v. Shrieve*, 14 Ill. 462.

⁴ *Bryant v. Pennell*, 61 Me. 108.

when the amount is left in blank. So, where a party mortgaged ashes, the number of bushels not being stated, parol evidence may be admitted to fix the number of bushels. And this is sufficient notice to third parties, it appearing that he had no other ashes except those described in the mortgage.¹ Parol evidence is admissible to show that in mortgaging a stock of goods, together with the fixtures, furniture and signs of the store, a wooden statue of an elephant was included as a sign used by the mortgagor.² So, "one ton of brass wire" may be shown to cover a particular mass of brass wire, and not exactly one ton in weight.³

¹ *Dunning v. Stearns*, 9 Barb. (N. Y.) 630.

² *Curtis v. Martz*, 14 Mich. 506.

³ *Barry v. Bennett*, 7 Met. (Mass.) 354. In this case the entire amount was but a little heavier than a ton, but the parties treated it as a ton and pointed it out as such, and made no arrangements for weighing it. Under these circumstances, parol evidence is admissible. But parol evidence cannot be resorted to, to show, as against creditors of the mortgagor, that the terms covering a stock of goods were intended to include the fixtures of the store where the goods were kept. The court says: "It would, indeed, be a startling doctrine if it should be held that written instruments, deriving all their force and effect from a record pursuant to the statute, could be explained and enlarged by parol proof of the real, though unexpressed, contract, as against one who became purchaser, or acquired a lien, relying upon terms of the recorded instrument." In *Van Evera v. Davis*, 51 Iowa 637, the court refused the mortgagee the right to show, by parol, that the mortgage had a different meaning and interpretation than the ordinary and obvious meaning of the words would imply.

CHAPTER III.

DELIVERY OF INSTRUMENT AND PROPERTY.

ARTICLE I.—DELIVERY OF MORTGAGE.

- 133. Presumption of Execution and Delivery.
- 134. Acceptance by Mortgagee.
- 135. When Filing Not a Delivery.
- 136. Acceptance by Creditor's Attorney.
- 137. Previous Agreement—Accepting Mortgage.
- 138. Ratification.
- 139. Delivery of Mortgage for Record—Presumption.
- 140. Parol Evidence.

§ 133. **Presumption of Execution and Delivery.**—A mortgage must be presumed to be executed at its date unless the contrary appears. The time of acknowledgment or recording may furnish the date. The delivery to the register of the mortgage and its subsequent possession by the mortgagee, are, in absence of other controlling facts, sufficient evidence of the delivery of the instrument. The date of the mortgage is *prima facie* evidence of the time when it was delivered.¹

The execution of a mortgage by one party in payment or security for payment of a *bona fide* indebtedness, and its filing for record, is, as between the parties, a sufficient delivery. If the mortgagor, instead of filing it himself, delivers it to a third party to be filed, and such person files it, it will also be a good delivery between the parties to the instrument. But if the rights of third parties intervene between the filing of such instrument and its acceptance by the mortgagee, the filing of the mortgage is not a sufficient delivery as against such parties. It has been said that if a creditor attaches the property mortgaged before the mort-

¹ Foster v. Perkins, 42 Me. 168. See, also, Maynard v. Maynard, 10 Mass. 455; Sweetzer v. Lowell, 83 Me. 446; Merrill v. Dawson, Hemp. C. C. 563.

gagee had accepted the security, he would have a prior lien upon the goods.¹

Several mortgages were given and accepted by the parties upon the day they were executed, excepting one, who lived in another city. The mortgage to him was delivered to his attorney to be placed on file. He notified his client by mail of the fact of the execution and filing the same day. It did not appear whether his client received the letter before or after the assignment of the mortgage. But the court held that it made no material difference, under the circumstances of the case, whether the attorney was filing the mortgage as agent of his client; that the execution of the mortgage and filing for record were a sufficient delivery.²

A mortgage, like any other contract, requires the consent of the mortgagor and the mortgagee, and it must be consummated by delivery. But when there is no prior understanding or agreement that any mortgage should or would be given, until after the property has been attached, no rule of law exists by which a subsequent assent could fix a lien on the attached property that would override the lien acquired by the attachment.³

But an understanding between the debtor's creditors and himself, that a mortgage on the merchandise should be executed for their security, the delivery of the instrument to the clerk of record is a sufficient delivery, for, under such circumstances, the act of the maker would as fully evidence his intention to consummate the prior agreement as would a delivery of the instrument to the creditor. But, until the contract had the assent of the parties, delivery to a person in no way a representative of the creditors could not give validity to the mortgage.⁴ Judge Miller says that it is a legal presumption, arising in all cases where an instrument, properly executed and acknowledged, and found in the pos-

¹ *Day v. Griffith*, 15 Iowa 104; *Welch v. Sackett*, 12 Wis. 243.

² *Field v. Fisher*, 65 Mich. 606.

³ *Foster v. Perkins*, 42 Me. 168.

⁴ *Wallis v. Taylor*, 67 Tex. 431.

session of the grantee, that it has been delivered, that it was delivered by the grantor and accepted by the grantee, in the absence of proof to the contrary.¹

§ 134. **Acceptance by Mortgagee.**—Delivery of a deed vests the title in the mortgagee. A delivery and acceptance of a mortgage are essential to its validity.²

An attorney, to whom was sent money for investment, at his discretion, applied it to his own use, executing a chattel mortgage to his principal as security. This was a valid delivery, because the attorney was authorized by the mortgagee, and accepted the mortgage and filed it in the clerk's office. He had full authority to place the money. It was contended by third parties that he could not avail himself of the chattel mortgage, because it was incompatible with his obligations as attorney to make use of the money as he did. But as the principal was satisfied with his agent's disposal of the money, third parties had no right to complain. They cannot avoid a chattel mortgage made by the agent for the benefit of the principal, even if it had to be conceded that, under the circumstances, the principal might have treated the transaction as unauthorized. But if a mortgagor executed a chattel mortgage in the absence and without the knowledge of the mortgagee, and handed it to his attorney with the declaration that he delivers it for the use of the mortgagee, it does not vest in the mortgagee the property, so as to defeat an attachment levied upon the same property by a creditor of the mortgagor, after the delivery of the mortgage to the attorney, prior to the time when the mortgagee received notice of the execution of the instrument and acceptance.³

§ 135. **When Filing Not a Delivery.**—The mortgagee must know of the mortgage and have entered into an agreement with the mortgagor. If made without the knowledge or

¹ *Wolverton v. Collins*, 34 Iowa 238; *Adams v. Frye*, 3 Met. (Mass.) 103; *Chandler v. Temple*, 4 Cush. (Mass.) 285; *Scrugham v. Wood*, 15 Wend. (N. Y.) 545; 30 Am. Dec. 75; *Games v. Stiles*, 14 Pet. (U. S.) 322; *Jaques v. Church*, 17 Johns. (N. Y.) 548; *Souverybye v. Arden*, 1 Johns. Ch. (N. Y.) 240.

² *Foster v. Perkins*, 42 Me. 168.

³ *Sargeant v. Solberg*, 22 Wis. 132.

authority of the mortgagee it is not valid.¹ There can be no delivery without acceptance by the mortgagee or grantee.

The filing or having an instrument recorded is not a delivery nor evidence of a delivery to the grantee.²

So, an instrument delivered to a register of deeds, is not a valid mortgage as against attachments, when the mortgagee had no knowledge of it; even his assent afterwards cannot make it so, as against third parties.³

A mortgagor, by agreement, executed a mortgage to his creditor, and delivered it to a third person with the expectation that it would be delivered to the creditor by the person receiving it, who caused it to be recorded, but the mortgagee did not authorize it. This was a good delivery to the mortgagee and his acceptance will be presumed.⁴

And, generally, the execution and record of a mortgage, pursuant to a previous agreement to that effect, constitutes a sufficient delivery and acceptance thereof.⁵

A mortgage in existence, having been executed and recorded long before a levy of an attachment, is prior in point of date.⁶

Where a person named as payee in a note and accompanying mortgage never had any interest in the same, and knew nothing of the transaction, and the papers were never delivered to him, the transaction is invalid and the mortgage void.⁷

§ 136. **Acceptance by Creditor's Attorney.**—In general, if a chattel mortgage is executed under an agreement that the

¹ *Baird v. Williams*, 19 Pick. (Mass.) 381; *Dole v. Bodman*, 3 Met. (Mass.) 139; *Day v. Griffith*, 15 Iowa 104.

² *Maynard v. Maynard*, 10 Mass. 455; *Bullard v. Hinkley*, 5 Greenl. (Me.) 272; *Hedge v. Drew*, 12 Pick. (Mass.) 141; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418; *Elsley v. Metcalf*, 1 Denio (N. Y.) 323; *Commercial Bank v. Reckless*, 1 Hals. (N. J.) 430; *Wiggins v. Look*, 12 Ill. 132.

³ *Cooper v. Jackson*, 4 Wis. 537; *Hulich v. Scowl*, 4 Gilm. (Ill.) 159; *Herbert v. Herbert*, Breese (Ill.) 278.

⁴ *Munoz v. Wilson*, 111 N. Y. 295.

⁵ *Deere v. Nelson*, 73 Iowa 187.

⁶ *Reid v. Abernethy*, 77 Iowa 438.

⁷ *Shirly v. Burch*, 16 Oreg. 83. See, also, *Terhune v. Oldis*, 44 N. J. Eq. 146; *Wolf v. Driggs*, 44 N. J. Eq. 363; *Flint v. Phipps*, 16 Oreg. 437.

debt shall be secured, the form of the security not having been specified, and then delivered to the attorney of the creditor, who filed it for record, this is a sufficient delivery.¹

And in general, the question of delivery is purely a question of fact. No particular form of words is necessary to constitute a delivery. An instrument may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both.² But by one or both of these it must be made.³ It is not necessary that there should be an actual handing over of the instrument to constitute a delivery.⁴

§ 137. **Previous Agreement—Accepting Mortgage.**—The making of a mortgage of personal property in pursuance of a previous agreement by the mortgagee, and a delivery of it by the mortgagor to the register for record, followed by acts of the mortgagee, assenting and adopting the mortgage, are evidence by which a jury may infer a delivery of the mortgage, from the time when such adoption takes place.⁵

A delivery of a mortgage to the register for record without the knowledge of the mortgagee, more than a year after the mortgagor has agreed with the mortgagee to secure his debt by such mortgage, is not necessarily a valid delivery of the mortgage, but is evidence of such delivery to be submitted to a jury.⁶

§ 138. **Ratification.**—A mortgage of personal property made by a debtor to secure a creditor, without his knowledge, although recorded, is not valid until its approval by the mortgagee.⁷

§ 139. **Delivery of Mortgage for Record—Presumption.**—

¹ Field v. Fisher, 65 Mich. 606.

² Flint v. Phipps, 16 Oreg. 437; Shep. Touch. 57.

³ Jackson v. Phipps, 12 Johns. (N. Y.) 421; Byers v. McClanahan, 6 Gill & J. (Md.) 250; Stewart v. Redditt, 3 Md. 67.

⁴ Fain v. Smith, 14 Oreg. 82; 58 Am. Rep. 281.

⁵ Thayer v. Stork, 6 Cush. (Mass.) 11.

⁶ Jordan v. Farnsworth, 15 Gray (Mass.) 517.

⁷ Oxnard v. Blake, 45 Me. 602; Dole v. Bodman, 3 Met. (Mass.) 139; Brown v. Platt, 8 Bosw. (N. Y.) 324.

The delivery by the mortgagor of a mortgage for record does not of itself raise the presumption of delivery for the use of the mortgagee.¹ But when it is agreed between the parties that the debtor shall execute and record a mortgage, his filing constitutes a delivery.²

Where there is an agreement that the debtor should be secured, but no specific property nor character of security is referred to, and a debtor, without the knowledge of his creditor, executes and files for record a chattel mortgage, it is no delivery as against an intervening attaching creditor.³

Where it is agreed that the debtor shall execute a chattel mortgage upon some specific property, but not specifically pointed out nor agreed upon, and the debtor afterwards, in the absence of the creditor, and without his knowledge, executes a mortgage upon certain of the specific chattels, and files it for record, this is not an effectual delivery against attaching creditors.⁴

But when a creditor authorizes his debtor to execute a chattel mortgage to secure his debt on property to be selected by the latter, the creditor being a non-resident, and to have the same recorded, it was held that the filing for record, by the debtor, of the mortgage executed in accordance with such agreement, constitutes a delivery to the mortgagee.⁵

§ 140. **Parol Evidence.**—If a chattel mortgage is made, and is without date, parol evidence is admissible to show the date of execution and delivery of the instrument.⁶ So, parol evidence of an erroneous date in a mortgage of personal property, not under seal, is admissible.⁷

The date of an instrument is only *prima facie* evidence of execution, and the true date can be shown by parol evi-

¹ Wardsworth v. Barlow, 68 Iowa 599.

² Everett v. Whitney, 55 Iowa 146.

³ Day v. Griffith, 15 Iowa 104.

⁴ Cobb v. Chase, 54 Iowa 253.

⁵ Everett v. Whitney, 55 Iowa 146.

⁶ Burditt v. Hunt, 25 Me. 419.

⁷ Partridge v. Swazey, 46 Me. 414.

dence.¹ So, parol evidence is admissible to show that a deed in the possession of the grantor was not delivered; such evidence does not infringe the rule that such evidence shall not be received to contradict a deed.²

ARTICLE II.—CONSTRUCTIVE DELIVERY OF PROPERTY.

141. What Is.

§ 141. **What Is.**—In certain cases constructive instead of actual delivery satisfies the law; still, in every case where delivery is not actual, there must be such a delivery and change of possession as the nature of the property is capable of. In every sale of personal property there must be such a delivery and change of possession attending the transfer as the nature of the property will permit, followed by removal and actual possession as soon as the bulk and condition of the thing and the circumstances will warrant. Thus, when a large quantity of lumber, piled in a mill-yard, was sold *bona fide*, the quantity being ascertained and the price paid, and the possession taken by the vendee, and the pile conspicuously marked with his name, but he was prevented by the condition of the roads, without incurring unusual expense, from removing it, he can maintain his title, and the lumber cannot be levied upon and sold for the debt of the vendor.³

What acts will amount to an immediate delivery and actual continued change of possession of personal property of a cumbersome and ponderous nature, such as a kiln of bricks, must depend in a great measure upon the circumstances of the particular case. Care should be taken in such case to keep in view the object of the statute, and to exact nothing less than a substantial observance of its salutary provisions.⁴

¹ *Stonebreaker v. Kerr*, 40 Ind. 186.

² *Roberts v. Jackson*, 1 Wend. (N. Y.) 478.

³ *Haynes v. Hunsicker*, 26 Pa. St. 58.

⁴ *Woods v. Bugbey*, 29 Cal. 466.

A creditor taking a large quantity of brick for his debt, and placing an agent in charge of them, is a sufficient change of possession, notwithstanding the property remains in the kiln and brick-yard of the debtor. It is not always necessary that there should be an actual removal of the goods and a change of possession from hand to hand.¹ But parties must leave nothing undone within the compass of their power to secure third persons from consequences of the change of ownership.²

A mortgagor delivered to the mortgagee a mortgage of three hundred cords of wood, situated upon a roadside, without an inclosure. Both went to the place where the wood was piled. The mortgagor said: "There is the wood. I deliver it to you as security for the money loaned." The wood was not marked. No person was put in charge. Once a day for a week after, the mortgagee went to the place where the wood was piled to see whether it was interfered with, and thereafter went from one to three times a week. The wood was never measured, except by the estimate of the mortgagee, or corded or moved, nor was any person in charge. This was not a valid delivery as against third parties.³

Actual delivery is contemplated by the statute, unless such delivery is impossible or extremely inconvenient; in such case a symbolic delivery would be sufficient. If property mortgaged can be transferred to the mortgagee by mere constructive or symbolic delivery, where actual delivery can be readily made, practically this would render the statute entirely nugatory and its object be totally defeated.

There being no means by which the public can ascertain whether personal property is mortgaged or not, except by the change of possession, the person in possession, exercising ownership over it, will be presumed to be the owner; for,

¹Allen v. Smith, 10 Mass. 308. See, also, Benford v. Schell, 55 Pa. St. 393; Hutchins v. Gilchrist, 23 Vt. 82; Cummings v. Griggs, 2 Duval (Ky.) 87; Long v. Knapp, 54 Pa. St. 514.

²Crow v. Woods, 6 S. & R. (Pa.) 274; Tognini v. Kyle, 17 Nev. 209.

³Wilson v. Hunt, 17 Nev. 401.

after being mortgaged, if it were allowed to remain in the possession of the mortgagor, without actual or constructive possession of the mortgage, mortgage after mortgage might readily be placed upon it. To accomplish the purpose of the statute, and to secure probity and fair dealing in transactions of this kind, the opportunities for fraud must be removed. There must not only be a transfer of the right of property, but possession must accompany it, either actual or constructive.

Thus, cattle were left where they were before the execution of a mortgage, under the control and charge of the same herdsman. Had there been a change in the herdsman, that would have been evidencing a change of property, and would have been sufficient to have effected a delivery, but there was no change, apparently, of property or of possession, when a delivery could easily have been made. This was not a sufficient change of possession, and a creditor of the mortgagor could hold by attachment or under execution.¹

In those States where notice is sufficient to protect the mortgagee's right against subsequent purchasers and creditors, the notice must be a clear and unequivocal designation of the property. Thus, where heavy merchandise, like pig-iron, is mortgaged, and the mortgage is not placed on file, and there is no actual delivery or apparent change of possession, there must be a sufficiently clear and unequivocal designation of the property to serve as notice of the mortgage to creditors or subsequent purchasers.

Marston, C. J., speaking of bulky articles, says that "no such delivery and actual and continued change of possession of such bulky property could be expected or insisted upon. Yet, there should be, even of bulky articles, such a clear and unequivocal designation thereof that creditors or subsequent purchasers could not be misled or be in doubt as to the nature of the transaction."²

A sale of personal property may be completed and the title pass, as to third parties, without actual delivery, when,

¹Doak v. Brubaker, 1 Nev. 218.

²Anderson v. Brenneman, 44 Mich. 198.

from the nature or situation of the property, actual delivery is impracticable. Thus, in Arkansas, the delivery to a purchaser of a ginner's receipt for cotton, which stipulated that the same was to be ginned, baled, &c., and delivered to the holder of the receipt, is a symbolic delivery of the cotton, and passes title to the purchaser free from the landlord's lien for rent, of which he had no notice.¹

The delivery of mortgaged chattels to the mortgagee, to render valid an unrecorded mortgage against a third person, is such a delivery as would be necessary in case of an absolute sale of the chattels.²

A mortgagee of four hundred tons of coal, part of a larger pile on the wharf of the mortgagor, took possession of the whole pile, with the consent of the mortgagor, and appointed the mortgagor his agent to sell his coal for him. This was held to be a sufficient delivery to vest the title in the mortgagee, and that he was entitled to hold the whole pile, against third parties, until he had had time and opportunity to separate and remove his four hundred tons. Judge Bigelow said: "The property in the part mortgaged passed, it being left to the mortgagee to select and separate it from the whole, which was placed in his possession and control for that purpose. Under such circumstances, it is very clear that neither the mortgagor nor those claiming under him could dispute the right of the plaintiff to hold the entire property until the object for which its possession was delivered to him should have been accomplished. The right of possession of the entire bulk had become legally vested in the mortgagee for a lawful purpose; neither the mortgagor nor his assigns had the possession or the right to the immediate possession of it; neither of them, therefore, could maintain trespass or trover against the mortgagee; nor could a creditor of the mortgagor, by attachment on mesne process or seizure on execution, disturb a possession thus acquired. The power to hold the whole property by the mortgagee was

¹Puckett v. Reed, 31 Ark. 131.

²Wright v. Tetlow, 99 Mass. 397.

coupled with an interest in him which neither the mortgagor nor his creditors could defeat. The right of all persons claiming title under the mortgagor, to the property not included in the mortgage, must be taken to be subordinate to the right, previously acquired by the mortgagee, of holding the whole in his possession until, by the use of due and reasonable diligence, he had separated and taken out the portion mortgaged to him." He further says that this case does not come within the rule touching sales of property in bulk in the hands of the vendor, where there is no designation or separation of the portion sold, but that it comes within a distinct class. The principle on which it rests is, that the delivery of the entire mass to the vendee, under the contract of sale, for the purpose of enabling him to separate and take out the portion sold, makes the sale and delivery complete between the parties; that thereby the property in the articles sold passes out of the vendor and vests in the vendee, who has the right to retain the whole until he has had sufficient time and opportunity to separate and take out the part belonging to him, in pursuance of the contract of sale.¹

So, the delivery of a brick-yard, upon the sale of a portion of the bricks by the thousand, passed the property in those sold, and the vendee could make his own selection.²

¹ *Weld v. Cutler*, 2 Gray (Mass.) 195.

² *Crofoot v. Bennett*, 2 N. Y. 258. See Section 277.

CHAPTER IV.

DESCRIPTION AND IDENTIFICATION.

ARTICLE I.—DESCRIPTION.

- 142. Sufficiency of Description.
- 143. What is a Valid Description—Illustrations.
- 144. Admitting Identity by the Pleadings Cures a Faulty Description.
- 145. Sufficient when Mortgagor and Chattels are in the Same County—
What Included.
- 146. Including all the Chattels of a Certain Class.
- 147. Rendered Sufficient by Parol Evidence.
- 148. The Property Must be Included in the Description.
- 149. Vague and Indefinite Terms.
- 150. Taking the Chattels from a Larger Amount of the Same Class.
- 151. Mortgages with Schedule.
- 152. Failing to Attach Schedule.
- 153. General and Specific Terms.
- 154. As to Crops.
- 155. Defective Description Cured.
- 156. When the Part Mortgaged Must be Separated.
- 157. Identification of Crops by Proof.

§ 142. **Sufficiency of Description.**—Any description in a chattel mortgage which will enable a third party, aided by inquiry which the instrument indicates and directs to identify the property covered by it, is sufficient.¹

In some cases, the identity is not ascertained by any specific description which distinguishes it from other property of the same kind or species, but by its locality. Thus, the description of a machine in a chattel mortgage by the name by which it is usually known, and as being in a certain place, is sufficient, although the machine is in an unfinished state, if it be in such a condition that, from its appearance, persons acquainted with like machines would know it by the designation given it in the mortgage. This description is sufficient, although some material parts are necessary to be added to make it complete.²

¹ *Smith v. McLean*, 24 Iowa 322; *Rawlins v. Kennard*, 26 Nebr. 181.

² *Lawrence v. Evarts*, 7 Ohio St. 194.

Where there is a larger quantity in the possession of the mortgagor than he specifies in the description, and no particular description of the articles, otherwise than by their general class and number, nor any selection or delivery of the articles, nor any specification as to which are intended, out of a larger lot of articles, such mortgage will be ineffectual to pass title to any particular property, or any interest in the property.¹ Thus, a mortgage which describes the property as "the entire stock in trade and fixtures" of the mortgagor, "consisting of clocks, watches, chains, show-cases, jewelry, and all goods included in his stock, tools and materials, excepting one safe, one regulator * * * and stock in trade to the amount of \$200," is void for uncertainty. This exception leaves in the mortgagor a proportionate interest in each article mortgaged, as \$200 is to the whole value of the property, uncertain and unsevered, and which is unseverable, excepting by some future act of the parties; it leaves the right to future selection of any of the property by the mortgagor to the value of \$200. Such uncertainty of description renders the mortgage void.²

And unless property is described so as to be capable of identification, the mortgage must be held void for uncertainty.³

Thus, a mortgage upon a stated quantity of mixed logs in the drive, is void for uncertainty, as against third persons who have acquired rights, if it does not furnish the data for separating the mortgaged logs from the mass. In a case involving these facts, the court said: "If the mortgagee should attempt to take possession of the quantity described, would he have the right to assort and take such logs as he thought proper, or would the mortgagor be the person to make the selection, or both together? If the mortgagee

¹ *Croswell v. Allis*, 25 Conn. 301; *Blakely v. Patrick*, 67 N. Car. 40.

² *Fowler v. Hunt*, 48 Wis. 345.

³ *Tootle v. Lyster*, 26 Kans. 589.

was the proper person; would he not be himself likely to pick out and take the most valuable, and if the mortgagor was the proper party to make the selection, he might take the very extreme, and point out those of least value, while if both should act in concert and disputes arise between them, which would have the right to control? Or, if they did agree, might they not make a selection entirely different from the one contemplated at the time the mortgage was given, for the purpose of injuriously affecting the rights and interests which third parties had in the meantime acquired in the property? It is clear that if the parties interested are to make a selection, then the persons who have, intermediate the date of the mortgage and the time of selection, acquired interests, should be consulted and take part, and if a number of persons have thus acquired distinct and separate interests, all would have to be called and would have a right to participate in the selection. This, to say the least, would result in such a diversity of interests that an amicable adjustment would hardly be within the range of possibility. There would be but one course left open, and that would be, in some way to take an average from the entire lot both in quantity, quality and value. The quantity might be taken by an average value, which would be very fair, as the best and the poorest logs might be selected to make the quantity taken average in value with the entire mass. It may be said that an average quantity should be taken from the entire lot that is found in the river. But from what part of the entire lot should they be taken—from the front, the rear or the center of the drive? It may be said there would be no difference, but this is not true; owing to the current, the quantity of water, and from other causes, logs of a certain kind, size and quality do not come down as fast as others; so, after the logs have been driven within the boom limits, a very great difference will be found to exist between the quality and value of the logs in the front and those in the rear of a drive. It seems to me that serious difficulties must inevit-

ably arise in any aspect of the case in attempting to carry out such an agreement."¹

Whatever comes under the description will be held under the mortgage, and one kind of property will not be taken to supply a deficit in another. Thus, when the mortgage covers forty head of beeves and twenty-five head of stock cattle, it will not authorize the appropriation of cattle of either kind to make up a deficit in the number of the other.²

Circumstances may sometimes be sufficient to identify the property. Thus, in a chattel mortgage, the property was described as forty milk cows, and the increase or calves of said cows; one gray horse, about ten years old; one bay horse, about ten years old; one sorrel pony, about four years old, and one mule, about twelve years old. The mortgagor was to retain possession, and not remove the property from a certain county. While in said county the property was levied upon, as shown by the evidence. But the court decided that the circumstances of the case made the description sufficient, and the mortgage was not, therefore, void for uncertainty.³

The mortgagee of cattle included in a certain chattel mortgage, covering all the property of the mortgagor, and describing it by the locality in which it is to be found, is entitled to their possession as against a subsequent pledgee of the same cattle, claiming under an instrument by which the mortgagor simply conveys all his interest in them.⁴

The mortgage cannot be made to cover property not included in the description. Thus, where the logs covered by a chattel mortgage are specifically described, parol testimony is inadmissible, in an action against a third person by the mortgagee, to show that the logs claimed by such third party were intended to be included in the mortgage, though not

¹ *Richardson v. Alpena Lum. Co.*, 40 Mich. 203; and see *Hires v. Hurff*, 39 N. J. L. 4; *Williamson v. Steele*, 3 Lea (Tenn.) 527; *Bullock v. Williams*, 16 Pick. (Mass.) 33.

² *Elliott v. Long*, 77 Tex. 467.

³ *Serafford v. Gibbons* (Kans.), 24 Pac. Rep. 963.

⁴ *Parker v. Farmers L. & T. Co.* (Iowa), 46 N. W. Rep. 1004.

mentioned therein.¹ But the mere description, in a chattel mortgage, of a white horse as a gray horse, there being several other chattels described correctly, will not vitiate the mortgage, as to a purchaser from the mortgagor, unless he was, in fact, after due diligence, misled by it. The mistake in one item of the description will not necessarily vitiate the mortgage as to third persons. To have that effect, the mistake must be such as would naturally mislead, or, notwithstanding due diligence, has misled third persons.²

In general, when the description is so indefinite and uncertain that third persons cannot be charged with the notice of the mortgage, it is invalid.³ A mortgage was upon all the stock in trade of the mortgagor, and it contained this clause: "Including any and all fixtures and stock now, or hereafter, kept in my said leather business, in the city of Keokuk, Lee county, and State of Iowa." The mortgagee placed the mortgage in the hands of the sheriff for foreclosure, who took possession of the stock in trade, including that which had been added after the mortgage was made, and a compromise was made between the mortgagor and mortgagee, by which the latter took possession of all the property and credited the former with the agreed value. Afterwards other creditors attached the property in the hands of the mortgagee, claiming that the after-acquired property could not be covered by the mortgage, but it was held to be a valid mortgage.⁴

"All the crops raised by me in any part of Jones county for the term of three years," is a roving description, with nothing in the way of identification to suggest inquiry where the crops may be found, except the body of the county. "One crop may be in one place in the county for one year in the three, and another place for another year, or there

¹ *Whitney v. Hall* (Mich.), 47 N. W. Rep. 27.

² *Adamson v. Fagan* (Minn.), 47 N. W. Rep. 56. See, also, *Eddy v. Cadwell*, 7 Minn. 225; *Adamson v. Horton*, 42 Minn. 161.

³ *Muir v. Blake*, 57 Iowa 662.

⁴ *Scharfenberg v. Bishop*, 35 Iowa 60.

may be crops in different parts of the county for the same year, and all would be covered by the mortgage, if the description be held sufficient." But such a description is ineffectual, because a chattel mortgage cannot be a drag-net covering a whole county in any such general terms.¹

The things to be mortgaged must be pointed out—described or pointed out—in some way, so that they can be distinguished and taken by the mortgagee. The mortgage and transfer of property are not completed, so as to pass the property, so long as anything remains to be done to identify it, or discriminate it from other things, when the property is capable of being identified by its physical attributes or characteristics.²

That is, a chattel mortgage must contain terms of description that will serve to distinguish the property embraced therein from all other property of the same kind, because the claim of the mortgagee is to be enforced on the identical property mentioned in the mortgage, and, if the description in that instrument be so vague and uncertain as necessarily to apply equally to all property of that kind, then there can be no identification of it, without proving some fact or circumstance connected with the property not referred to in the mortgage.³

But the courts will construe the language of the instrument, if they can do so without violence to it, so as to sustain the contract, rather than to avoid it, because it is not to be presumed, in a case of doubt, that the parties deliberately made an instrument which was of no legal value whatever. On the other hand, the presumption must be indulged, unless the contrary appears from the language employed, that the parties meant to make a legal and binding contract.⁴

§ 143. **What is a Valid Description.**—The description of the property must be such as to distinguish it from other

¹ *Muir v. Blake*, 57 Iowa 662.

² *Newell v. Warner*, 44 Barb. (N. Y.) 258.

³ *Kelly v. Reid*, 57 Miss. 89.

⁴ *Draper v. Perkins*, 57 Miss. 277.

chattels, or should contain some hint to direct any party as may examine the mortgage as a source of information. The description must be such as to enable third persons to identify the property, aided by inquiries which the mortgage indicates.¹ Thus, the description must contain such particularity as will guide to the property, or point to some extrinsic fact, by means of which the requisite certainty is obtained.² A wagon described as "one four-horse, iron-axle wagon," without designating the ownership or location or other description, is insufficient.³ But a mortgage of ten horses, when the mortgagor has only ten, is good.⁴

A description as "forty-one Berkshire hogs and sixty-five grain sacks," is not void for uncertainty as to invalidate the mortgage. The court says: "The hogs are described in the mortgage as Berkshire hogs. The testimony shows, or, at least, tends to show, that the mortgage covers and includes all the hogs and grain sacks the mortgagor owned. The description of the property in the mortgage is about as specific as the nature of the property will allow. One hog is very much like another hog of the same breed, and one grain sack is apt to be much like another. These belong to a large class of articles which it is difficult to describe except by name and variety. We did not think it ought to be held that the description of the property in the mortgage is so uncertain as to render the mortgage void as to such property. We apprehend that the property might be found and identified without much difficulty, if a little diligence was used in that direction."⁵

Though a bill of sale is not executed and recorded as required by statute, it may become a valid mortgage as between the parties, giving the mortgagee right to take possession. And on his being compelled to pay the costs, for which he

¹ Price v. McComas, 21 Nebr. 195.

² Bowers v. Andrews, 52 Miss. 596.

³ Nicholson v. Karpe, 58 Miss. 34.

⁴ Eddy v. Caldwell, 7 Minn. 225.

⁵ Knapp v. Deitz, 64 Wis. 31.

was security, the legal title to the mortgaged property vests in him. And to strangers the bill of sale may be void for uncertainty, but this objection would not be material between the parties. The mortgagee's taking possession of the property, any defect in the description was cured, and the instrument must then be upheld.¹

It is not to be unnecessarily presumed, in the absence of proof or conflicting rights, that the parties deliberately made an instrument which was to be of no legal effect whatever, even between themselves; on the contrary, the presumption is that the parties meant to make a valid and binding contract.²

Where an equitable mortgage is claimed as the result of an agreement, there must be, at the time such agreement was made, such an identification of the property that the equitable mortgagee may see, with a reasonable degree of certainty, what property it is that is subject to his lien. In order that a lien may arise, the agreement must deal with some particular property, either by identifying it or by so describing it that it can be identified, and must indicate with sufficient clearness and notice that the property was described, or rendered capable of identification, which was to be given or transferred as security for the obligation. If the evidence fails to show the particular property in a controversy, to which the alleged agreement refers, so as to identify it, it cannot be ascertained to what property the lien attaches, and the claim cannot be allowed.³

A description, "one sorrel horse, three years old," is not sufficiently definite to import constructive notice to third parties, though the mortgage also recites the mortgagor's place of residence, and provides for the place of sale in case of foreclosure.⁴

¹ *Horn v. Reitter*, 12 Colo. 310.

² *Draper v. Perkins*, 57 Miss. 277; *Richardson v. Alpena Lum. Co.*, 40 Mich. 203.

³ *Lee v. Cole*, 17 Oreg. 559.

⁴ *Barrett v. Fisch*, 76 Iowa 553. See *Lininger v. Mills* (Nebr.), 45 N. W. Rep. 463.

But a description was held sufficient that mentioned all the cattle of one year of age and upwards, mentioned in a certain bill of sale, describing them of the "star brand" of a certain party, and which were to be branded with a tally brand for their better identification, the tally brand to consist of a bar, and that the cattle were situated on a certain range, and included all of said star brand.¹

A description is not sufficient which describes with other cattle, ten oxen among them, "one red, five years old; two red, five years old," and "one black, five years old," in possession of the mortgagor in a certain town, when it appears by evidence that the cattle were two red oxen, five years old, and one black ox, five years old.²

A description is valid which describes "fifty head of steers about (20) months old, now owned by me, and in my possession on my farm in Independence township, in Jasper county, Iowa." The fact that part of the farm is in another township is not material.³

The following is sufficient to render constructive notice: "All my crop of corn and cotton for the year 1884, in Faulkner county, Arkansas," provided the mortgage is recorded.⁴

The mortgage of brick to secure money loaned, described the brick as located on certain lots at the kiln, but no brick were designated as those on which the mortgage was given. The mortgagor thereafter used brick from the kiln in the erection of a house, but testified that during the time in which the brick used in the building were made, he was making and selling brick continually, and could not state whether those used in the building were made before the mortgage was executed or not. Held, an invalid mortgage as to third persons, and that the mortgagee had no mechanics' lien on the building as against the lienholders.⁵

¹ Com. Nat. Bank, *v.* Davidson (Oreg.), 22 Pac. Rep. 517.

² Kellogg *v.* Anderson, 40 Minn. 207.

³ Kenyon *v.* Tramel, 71 Iowa 693.

⁴ Johnson *v.* Grissard, 51 Ark. 410. See, also, Watson *v.* Pugh, 51 Ark. 218.

⁵ Meredith *v.* Kunze, 78 Iowa 111.

When the description in a chattel mortgage is correct as far as it goes, but fails fully to point out and identify the property intended to be conveyed, a subsequent purchaser or incumbrancer is bound to make every inquiry which the instrument itself could reasonably be deemed to suggest. A description cannot be said to be incorrect where it is shown that some would call a horse brown in color, and others would call it black, if it be described by either color.¹

A mortgage bill of sale of "all the desks, chairs, trunks and office furniture" in a certain office, the mortgagor intending that all articles of use in the office at the time should pass, embraces an iron safe which was then used there, as it would be considered as an article of furniture.²

§ 144. **Admitting Identity by the Pleadings Cures a Faulty Description.**—Thus, a mortgagee of a "dark-bay mule" may recover on a black mule from a subsequent purchaser, when the identity of the mule is admitted by the pleadings and established by proof.³ Otherwise the chattel should be specifically named. A mortgagee claimed three horses under the following description: "And all and singular other the goods, chattels and effects whatsoever, now in or upon the premises occupied by the within-named mortgagor. * * * And all the fixtures, other goods, chattels and effects whatsoever in our store, coming, or which may, during the continuance of the within security, be brought into or upon said above-mentioned premises." The mortgagors had previously offered the horses as security to another creditor, and at the time of the execution of the mortgage, the parties were disputing whether the horses should be included. It was decided that the mortgage did not cover the horses, but that it did include horses afterwards obtained by exchange for them and brought upon the premises.⁴

¹ Yant v. Harvey, 55 Iowa 421.

² Skowhegan Bank v. Farrar, 46 Me. 293. See, also, Talbert v. Horton, 33 Minn. 104; Talbert v. Horton, 31 Minn. 518.

³ Harris v. Woodard, 96 N. Car. 232.

⁴ Howell v. Francis (N. J.), 10 At. Rep. 436.

§ 145. **Sufficient When Mortgagor and Chattels are in the Same County—What Included.**—A description of “one bay horse named Billy, ten years old last spring, and one one-seated buggy, and one set of harness, all of which is in my possession, and clear of incumbrance,” is sufficient, provided the mortgage shows that the mortgagor resided in a particular county, and had a condition that if any attempt to remove the property from that county is made, the mortgagee may take possession.¹ So, also, where the description was “twenty-three head of horses and mules. * * * All situated on their range on the S. L. river; * * * the above-described chattels are now in their possession, are owned by them.” The testimony showed the range in question to be situated in the county where the mortgage was filed, and that the horses and mules were all those possessed by the mortgagors, which made it a sufficient description.²

§ 146. **Including all the Chattels of a Certain Class.**—A description in a trust deed of a number of chattels as “on Y. Farm,” is sufficient to pass title to the property, when the number mentioned in the deed includes all the articles answering that description.³ But a description of “nine head of two and three-year-old steers,” is, where the mortgagor owns a herd of ninety steers, insufficient, even if the mortgagee has separated the cattle alleged to be those described. The fact that, before the levy of the attachment, certain steers had been separated from the whole number and claimed under a second mortgage, is unavailing as against such creditor, unless it was also shown at the time the mortgage was executed there was an agreement that it should apply to such steers.⁴

The following description was held sufficient: “All goods of whatever description which we have at Annona, Texas ;

¹ *Brock v. Barr*, 70 Iowa 399.

² *Wiley v. Shars*, 21 Nebr. 712.

³ *Spivey v. Grant*, 96 N. Car. 214.

⁴ *Price v. McComas*, 21 Nebr. 195. See, also, *Eddy v. Caldwell*, 7 Minn. 225; *Burditt v. Hunt*, 25 Me. 419; *Brinley v. Spring*, 7 Me. 241; *Beach v. Derby*, 19 Ill. 617; *Skowhegan Bank v. Farrar*, 46 Me. 293.

also the stock of goods which we have at Dalby Springs, Bowie Co., Texas.”¹

When a mortgage mentions a specific number of articles of a certain kind, in and about a shop, and also all the other personal property there situate, the specific enumeration does not prevent the passing of other articles of the same kind, which are in and about the shop.²

§ 147. **Rendered Sufficient by Parol Evidence.**—Parol evidence is admissible to identify the chattels when they are covered by the mortgage.³ Thus, when a description is insufficient, parol evidence may be admitted. A duly-recorded chattel mortgage of livery stock described the horses as “eight horses; being the same now in stable No. 19 Silver street.” This was valid as against a subsequent purchaser of two of the horses, although, at the time the mortgage was executed, for some time previous and subsequent thereto, many other horses, not owned by the mortgagor, were constantly boarded at the stables. Parol evidence to establish the identity of the personal chattels embraced in a mortgage, but not particularly described therein, is admissible.⁴ So, where a chattel mortgage specifically describes sundry printers’ implements, material, presses, and the like, in a printing office, and also, in addition, included, in general terms, all fixtures and furniture used therein, parol evidence may be introduced to show what property might properly be so denominated in such an establishment, and what articles are not included in either description.⁵

The following description in a chattel mortgage is sufficient: “All the cattle, consisting of two yoke, aged six

¹Crow v. Bank, 52 Tex. 362.

²Harding v. Coburn, 12 Met. (Mass.) 333.

³Sargent v. Solberg, 22 Wis. 132; Russell v. Winne, 37 N. Y. 591; Nicholson v. Karpe, 58 Miss. 34; Harding v. Coburn, 12 Met. (Mass.) 333; Wagner v. Watts, 2 Cr. C. C. 169; Burns v. Harris, 66 Ind. 536; Stephens v. Tuck, 13 N. J. L. 600; Pike v. Colvin, 67 Ill. 227; Myers v. Ladd, 26 Ill. 415; Spaulding v. Mozier, 57 Ill. 148; Beach v. Derby, 19 Ill. 617; Smith v. McLean, 24 Iowa 322; Luce v. Morehead, 77 Iowa 367.

⁴Elder v. Miller, 60 Me. 118.

⁵Butts v. Print. and Pub. Co., 43 Minn. 56.

and seven years, color red, white and blue, * * * and all other property now in our possession, in or about said village." Where several oxen are described in a mortgage as red, white and blue, the full description need not apply to each.¹

Parol evidence is admissible to establish the identity of personal chattels in a mortgage, not particularly described in it.² So, a mortgage of "30 head of cattle, 3 horses, and 2 mules," is void for uncertainty; but if the animals were described as belonging to the mortgagor, who owned only that number of each class, it would seem that the mortgage would be valid, and the animals could be identified by parol evidence. In all mortgages the fact of the ownership or locality of the property, or some other mark, when proved to exist, which would separate and distinguish it from other property, should be mentioned in the mortgage.³

Whenever the description is applicable to more than one subject, extrinsic evidence is admissible to prove what is intended.⁴ A mortgage of "ten horses, in the possession of the mortgagor," is good when he has only that number;⁵ so is one valid of "6 bales of cotton, now growing and being grown and produced on the plantation in Lee county, cultivated by myself, and known as the Jesse Tucker plantation."⁶

But a mortgage of "ten new buggies" is void when the mortgagor has more than that number.⁷

A mortgage of a specified number of different kinds of furniture is valid as to those kinds of which all are covered, and void as to those kinds of which all were not covered.⁸ And, in general, written descriptions of property are to be

¹ *Fordyce v. Neal*, 40 Mich. 705.

² *Brooks v. Aldrich*, 17 N. H. 443; and see *Johns v. Church*, 12 Pick. (Mass.) 557.

³ *Kelly v. Reid*, 57 Miss. 89.

⁴ *McChesney v. Wainwright*, 5 Ohio 452; *Johns v. Church*, 12 Pick. (Mass.) 557.

⁵ *Eddy v. Caldwell*, 7 Minn. 225.

⁶ *Stephens v. Tucker*, 55 Ga. 543.

⁷ *Blakely v. Patrick*, 67 N. Car. 40.

⁸ *Croswell v. Allis*, 25 Conn. 301.

interpreted in the light of the facts known to and in the minds of the parties at the time of the contract. A subsequent purchaser is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge.

Descriptions do not identify themselves, but only furnish the means of identification; they give certain marks or characteristics, or historical data or incidents by the aid of which the thing intended may be singled out from all others, not by the description alone, but by that explained and applied.¹ Thus, a description in a chattel mortgage, of "all the dry goods, boots and shoes, millinery goods, and gentlemen's furnishing goods and stock in trade now in the store occupied by" the mortgagors, is valid, because the generality and indefiniteness of the description can be rendered sufficiently definite by evidence of the facts as to the goods in the store at the time, and will convey whatever in fact answers the description.² Neither is a mortgage invalid because the description is not correct as to the age of cattle embraced, where it clearly appears from the evidence what cattle were intended; and especially will it be so held where the party claiming in opposition to the mortgage was not misled by the erroneous description, and could not have been so misled, in the exercise of ordinary care. Thus, where the mortgagor has but one yoke of oxen at the time of giving the mortgage on them, and continued to have the same oxen, and no others, from that time until purchased by a third person, and the jury find that they are the ones described in the mortgage, the mortgage is valid.³

So, a chattel mortgage is good that describes the property as "fifty cords of wood piled upon lot 1, block 83," although the evidence showed that there were eighty-five cords of wood on Lot 1 at the time the mortgage was executed, owned by the mortgagor. The court said: "It would un-

¹ Willey v. Snyder, 34 Mich. 60.

² Conkling v. Shelley, 28 N. Y. 360.

³ Harris v. Kennedy, 48 Wis. 500.

doubtedly be a very desirable rule, if it were possible, to describe property mortgaged so that one could ascertain from the face of the instrument itself what property was intended to be embraced therein. But it is evident that resort must frequently be had to parol evidence to apply the description in the mortgage. It is not readily perceived how the description of the wood in this case could have been more certain and specific; and, as there were several other piles of wood on the same lot, it was necessary to resort to extrinsic proof to identify the property.”¹

§ 148. **The Property Must be Included in the Description.**—While parol evidence may be admitted to identify property which is included in the descriptive words, yet property not answering the description cannot be shown to be covered by the mortgage.² There can be no agreement by the parties that will bind others, that there shall be a substitution of other property for that first specified.³

§ 149. **Vague and Indefinite Terms.**—Vague and indefinite terms will defeat a chattel mortgage. The authorities hold, with marked unanimity, that where there is a larger quantity of property of the same kind in the possession of the mortgagor than is expressed in the specification of the mortgage, and no particular description of the articles or property otherwise than by their general class or number, nor any selection or delivery of the articles, nor any specification as to which are intended out of the large lot of articles then on hand, such mortgage will be ineffectual to pass any title to any particular property, or any interest in the property on hand.⁴ Thus, a mortgage of “forty head of cattle, of different ages and sexes, most of them thoroughbreds,” on the mortgagor’s farm, where, at the time of the execution of the

¹*Sargeant v. Solberg*, 22 Wis. 132. And see, also, *Harding v. Coburn*, 12 Met. (Mass.) 333; *Barry v. Bennett*, 7 Met. (Mass.) 354; *Lawrence v. Evarts*, 7 Ohio St. 194; *Call v. Gray*, 37 N. H. 428.

²*Hutton v. Arnett*, 51 Ill. 198.

³*Hunt v. Bullock*, 23 Ill. 320.

⁴*Rood v. Welch*, 28 Conn. 157; *Golden v. Cockril*, 1 Kans. 259.

mortgage, he had forty-five or forty-six head of cattle, is too indefinite.¹

But the degree of accuracy of particularity with which property must be described, depends upon its nature, but must be such that a third party can have no great difficulty in identification as described. The mortgage must mention some fact or circumstances connected with the property which will serve to distinguish it from all other property of the same kind. This fact or circumstance must be stated in the mortgage itself. It cannot be proved by parol testimony, unless there be added to the mortgage a term not contained in it. If the description in the instrument be so vague and uncertain as necessarily to apply clearly to all property of that kind, then it is clear there can be no identification of it, without some fact or circumstance connected with the property not referred to in the mortgage. When the precise number only is conveyed, and there is in fact a greater number, and no intention is manifest to include the whole, there would be a failure of identification of particular things conveyed, and the mortgage must be void for want of proper description.²

§ 150. **Taking the Chattels From a Large Amount of the Same Class.**—Where there is a larger quantity of property of the same kind in the possession of the mortgagor, than is embraced in the specifications of the mortgage, and no particular description of the articles of property, otherwise than by their general class or number, nor any selection or delivery of the articles, nor any specification as to which are intended to be taken from the large lot of articles then on hand, such mortgage will be ineffectual to pass any title to any particular property, or to any interest in the property.³

So, a mortgage of "ten new buggies," without delivery of possession, the mortgagor having more than ten buggies on hand at the time, will be ineffectual to pass title to any

¹Stonebraker v. Ford, 81 Mo. 532.

²Gardner v. McEwen, 19 N. Y. 123; Conkling v. Shelley, 28 N. Y. 360.

³Fowler v. Hunt, 48 Wis. 345.

particular buggies, or to any interest in the buggies on hand.¹

The articles mortgaged must be of such a nature and so situated as to be capable of being specifically designated and identified by the written description. If they are to be weighed, measured, counted off, or otherwise separated from others of the same kind, and larger parcels or quantities, such requisites must be fulfilled.²

The authorities hold, with marked unanimity, that where there is a larger quantity of property of the same kind in the possession of the mortgagor than is embraced in the specification of the mortgage, and no particular description of the articles or property, the mortgage will be ineffectual to pass any title to the property.³ Thus, a mortgage given on "one hundred and twenty-four head of mules," in the State of Kansas, is invalid, although it did not appear affirmatively that the mortgagor had any other mules in said locality. The court said: "But he might have had a much larger number than he chose to include in the mortgage, and as there was nothing to distinguish those intended to be included in the mortgage from the rest, an indefinite amount of stock might, perhaps, have been shielded from the claims of creditors by the mortgage of a small part of them."⁴

So, a mortgage is invalid that is given to cover "one hundred feet of white-pine saw-logs, now on the north branch of Thunder Bay river," because, at the time of the execution of the instrument, the mortgagor had a much larger amount of such logs at the given place. Judge Marston said: "As well might we undertake to enforce a chattel mortgage given upon ten head of cattle in a drove or herd of fifty. To sustain such mortgage would, I think, enable parties to commit gross frauds, and would also tend to prevent third

¹ *Blakely v. Patrick*, 67 N. Car. 40; 12 Am. Rep. 600. See, also, *White v. Wilks*, 5 Taunt. 176.

² *Bullock v. Williams*, 16 Pick. (Mass.) 33.

³ *Fowler v. Hunt*, 48 Wis. 345.

⁴ *Golden v. Cockril*, 1 Kans. 259.

parties from afterwards purchasing or acquiring interest in the property, a part of which had been thus mortgaged, and thus tend to discourage trade.”¹

So, a mortgage describing the property therein conveyed as “forty head of cattle of different ages and sexes, most of them thoroughbreds,” and as being on the mortgagor’s farm in a certain county, is ineffectual, where the evidence showed that, at the time of the execution of the mortgage, the mortgagor had “forty-five or forty-six head of cattle on his farm, of different ages and sexes.”²

§ 151. **Mortgage With Schedule.**—If a schedule is used in mortgaging property, and the mortgage recites it as annexed, the mortgage will be void, unless it contains a sufficient description of the property to identify it.³

A mortgage of personal property described the “following goods and chattels,” and then followed a list of articles on a separate piece of paper and attached to the deed by a wafer. This was equivalent to a description in the mortgage, as it completed and perfected it. It is something without which the deed would be insensible. It is not an erasure nor an interlineation, nor is there anything in it which raises a suspicion of fraud. In the absence of evidence the presumptions are all in its favor.⁴

§ 152. **Failing to Attach Schedule.**—If a mortgage refers to a schedule, it will be valid as to all property that can be identified, though the schedule be not annexed.⁵

A mortgage which is made on the furniture of a hotel, and reciting that an inventory is to be made and annexed, is good, though the schedule is not made and annexed.⁶ A mortgage is valid which refers to a schedule annexed to

¹ *Richardson v. Alpena Lum. Co.*, 40 Mich. 203.

² *Stonebraker v. Ford*, 81 Mo. 532. See, also, *Croswell v. Allis*, 25 Conn. 301.

³ *Edgell v. Hart*, 9 N. Y. 213.

⁴ *Belknap v. Wendell*, 21 N. H. 175. See, also, *Weeks v. Maillordet*, 14 East 568; *Newell v. Warner*, 44 Barb. (N. Y.) 258.

⁵ *Winslow v. Merchants Ins. Co.*, 4 Met. (Mass.) 306.

⁶ *Van Heusen v. Radcliff*, 17 N. Y. 580.

another mortgage, made by the same mortgagor to another mortgagee. Description of the other mortgage should be given sufficiently to identify it.¹

§ 153. **General and Specific Terms.**—A mortgage enumerating particular articles, followed by a general description, will include the property in the general description, if the language used so indicates.²

Thus, a mortgage specifically describing the furniture of an hotel, had a general clause embracing “all the other goods, effects, furniture, chattels, property, things of every name and nature now used, attached, situate and being in or about the hotel,” includes a schooner-rigged sail-boat, then upon a lake near the hotel, and which was used in connection with the hotel, though the mortgage specified mentioned four other similar boats.³

A party made a mortgage of eighteen hundred bushels of salt, and of his entire fishing outfit, consisting of seine-boats and fish-stands at a certain place. Then he executed a second mortgage, conveying all the fishing outfit, consisting of seine-boats, fish-stands, barrels, sixteen hundred bushels of salt, and kegs, subject to the prior mortgage, property being located at the same place as the first. The sixteen hundred bushels of salt were purchased subsequently to the giving of the first mortgage and had been kept by itself. It was decided that the first mortgage was no lien upon these; the words “entire fishing material” did not cover the barrels and kegs mentioned in the second mortgage, and that “subject to prior liens” did not extend the scope of the previous grant, and included nothing except as described by its own terms.⁴

General clauses following specific enumerations of articles, refer, ordinarily, to articles of the same kind as those specifically enumerated.⁵

¹Newman v. Tymeson, 13 Wis. 172.

²Russell v. Winne, 37 N. Y. 591.

³Veazie v. Somerby, 5 Allen (Mass.) 280.

⁴Dixon v. Coke, 77 N. Car. 205.

⁵Brainerd v. Peck, 34 Vt. 496.

When a chattel mortgage embraces a whole herd of cattle, a separation is unnecessary.¹

§ 154. **As to Crops.**—The description of crops must be definite enough to identify the property mortgaged. A vague description will not answer. Thus, a mortgage of “my entire crop of every description” is too vague and is insufficient.² But a mortgage of “all of the crops of corn and cotton, and cotton seed, and crops of every other name and description to be grown” in a certain year, in a certain county, is a sufficient designation.³

A mortgage was made of corn to be planted. It was duly planted, and then levied upon by the mortgagor’s creditor, the mortgagee not having taken possession. The levy was held good under the Nebraska law.⁴ A mortgage of “my entire crop of corn, cotton seed, fodder, peas, potatoes and cane, that I may grow the present year,” is good.⁵ A mortgage of “all and the entire crop of flax and wheat and other grain and produce raised on the east half,” &c., is insufficient and indefinite, as not showing when the crop was raised.⁶ A mortgage of ten bales of each annual crop of cotton to be produced on certain lands, is void for uncertainty.⁷

So, a mortgage of “all of a crop of ten acres of cotton to be grown” on a forty-acre field, is void for uncertainty.⁸

But “one-half of all the crop” on certain land is a sufficient description.⁹

A mortgage describing property as “all the cut and growing and having grown” crop on the premises is insufficient to give third parties notice.¹⁰

A description as “my entire crop of cotton and corn to be

¹ *Cattle Co. v. McLain*, 42 Kans. 680.

² *Rountree v. Britt*, 94 N. Car. 104.

³ *Hamilton v. Maas*, 77 Ala. 283.

⁴ *Cole v. Kerr*, 19 Nebr. 553.

⁵ *Seay v. McCormick*, 68 Ala. 549.

⁶ *Eggert v. White*, 59 Iowa 464.

⁷ *Dodds v. Neel*, 41 Ark. 70.

⁸ *Krone v. Phelps*, 43 Ark. 350.

⁹ *Melin v. Reynolds*, 32 Minn. 52.

¹⁰ *Cray v. Currier*, 62 Iowa 535.

raised by me the present year, or contracted by me," is not void for insufficiency.¹

§ 155. **Defective Description Cured.**—A chattel mortgage, designed to cover crops to be raised on certain land, is binding, according to the Iowa law, on one having actual notice of it, though the description is defective. A description is defective when it fails to state the year or time in which the crop is to be raised, where the description is so indefinite and uncertain that the recording thereof will not import notice, yet such a mortgage is not void, but, on the contrary, is good as to all persons having actual notice of its existence, and the intent as to the property which it was designed to include. Thus, a mortgage describing "all crops growing and to be grown" on the land specified, is good as to those having actual notice, even if the description is defective.²

§ 156. **When the Part Mortgaged Must be Separated.**—If a party should give a mortgage on three bales of cotton which he might raise the present year on a certain plantation or elsewhere, and it appeared that he raised more than three bales, in order to secure these, they must be separated before any other lien attaches.³ So, a mortgage of so much of a growing crop of cotton as will make two bales of cotton, each weighing no less than five hundred pounds, the same to be prepared for market by the mortgagor, and delivered by a certain date, passes no title to the mortgagee unless they are separated, provided another lien attaches before the date, and before separation from the rest.⁴

A mortgage of crops "now standing and growing," does not include grain which has been cut at the time of the execution.⁵

§ 157. **Identification of Crops by Proof.**—A mortgage of "my entire crop of cotton and corn for the present year,"

¹ Henderson v. Gates, 52 Ark. 371.

² Luce v. Moorehead, 77 Iowa 367.

³ Draper v. Perkins, 57 Miss. 277.

⁴ Williamson v. Steele, 3 Lea (Tenn.) 527.

⁵ Ford v. Sutherlin, 2 Mont. 440.

with no other descriptive words, may be identified by extrinsic proof.¹ So, growing crops, after harvesting, may be shown to be those described in the mortgage, even after being sold in market.² A mortgage of six acres of grass on ground occupied by the mortgagor as a tenant, may be shown to be hay stacked upon other land occupied by the mortgagor, and is subject to the mortgagee's claim.³

ARTICLE IV.—CONSTRUCTION.

158. As to the Location of the Chattel.

159. As to Identity of Chattels.

160. As to Crops.

161. As to Animals.

162. As to Farming Utensils.

§ 158. **As to the Location of the Chattel.**—It is not a sufficient location of mortgaged chattels to describe them as being in a county named.⁴

A description is insufficient where the chattel mortgage describes the property as "contained in cribs 1 and 2, south of the side track," the testimony showing that the cribs were not numbered.⁵ But describing the personal property in general terms, giving its character and specifically stating in what building and rooms it is situate, is sufficient.⁶

So, it is a sufficient description of saw-logs, when the mortgage is for one and a half million feet of pine saw-logs, a part of which are in a specified lake, and the balance to be cut and placed there from certain designated lands.⁷

A mortgage describing the property conveyed as "lumber piled on said premises known as block 113," without

¹Ellis v. Martin, 60 Ala. 394.

²Duke v. Strickland, 43 Ind. 494.

³Smith v. Jenks, 1 Denio (N. Y.) 580.

⁴Warner v. Wilson, 73 Iowa 719.

⁵Grimes v. Cannell, 23 Nebr. 187.

⁶Muncie National Bank v. Brown, 112 Ind. 474.

⁷Boykin v. Rosenfield, 69 Tex. 115.

extrinsic evidence showing that the mortgagor had, at the time of its execution, lumber answering such description, is defective and is inadmissible to show title in the mortgagee.¹ The description is sufficient when it substantially corresponds with the property intended to be mortgaged, and the mortgagor has no other property to which it could be applied, so that no one could be misled by the improper description, and where it is admitted that the property claimed is the same as was intended to be mortgaged.²

A recorded mortgage, covering specified property, and all other property which the mortgagor may thereafter acquire and use in connection with a particular business, is valid as against an attachment by a subsequent creditor, upon the property afterwards bought by the mortgagor for use in that business.³

A mortgage "of all that certain stock of one-inch seasoned lumber, being one car-load of 12,000 feet," and further description of the property as being at a particular place in a certain city, may, as between the parties, or as to a subsequent purchaser with notice, or a stranger, be shown by evidence to be applicable to the car-load of said lumber situated at a different place in the city from that named in the mortgage.⁴

§ 159. **As to Identity of Chattels.**—Whether the property embraced in a mortgage can be identified by the description, is a question for the jury. Thus, a mule sold under a mortgage was the one described, and the judgment debtor had no other mules. The question of identity of the mule was for the jury, although the mortgage described the mule as black, and the mule sold was described as dark mouse-colored.⁵

Property described as "one six- $\frac{1}{2}$ foot cut Plano Harvester or Binder," is insufficient to import constructive notice, but

¹Gregory v. North Pacific Lumber Co., 15 Oreg. 447.

²Schmidt v. Bender, 39 Kans. 437.

³Eddy v. McCall, 71 Mich. 497.

⁴Adamson v. Peterson, 35 Minn. 529.

⁵Tompkins v. Henderson, 83 Ala. 391.

the mortgage may be introduced in an action against a constable for levying on the property mortgaged, where the execution creditor is shown to have had actual notice.¹

Where the property secured is described as "one portable saw-mill," evidence is admissible to prove the extent and meaning of the words, and of the sense in which the parties used them. It was also proper to show that a "skid engine," used to run the mill, was a part, and intended to be included in the description.²

Any description of property which is sufficient to lead to its identification is valid,³ and whether property embraced in a mortgage can be identified by the description in the instrument is a question of fact to be determined by the jury.⁴ But lack of proof of the identity of the property mortgaged, and the property in controversy, in an action to recover property, will defeat the claim.⁵

§ 160. **As to Crops.**—A mortgage of "20 acres of wheat now sown and growing on the ground, and still to be sown, on the 20 acres, this present season, on the farm," is not void for uncertainty, as against a subsequent mortgagee; it covers the first twenty acres sown that season, or so much thereof as was sown when the mortgage was executed.⁶

A mortgage describing certain property as "crops growing and to be grown" on certain land, is sufficiently definite to cover crops growing at the time of the execution, and as to them is valid, although the year when the crops are to be grown is not specified; distinguishing *Pennington v. Jones*, 57 Iowa 37.⁷

An instrument was filed as a chattel mortgage, which had the following description: "All that certain personal property described as follows, to wit: The N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$

¹ *Plano Manf. Co. v. Griffiths*, 75 Iowa 102.

² *Wiber v. Illing*, 66 Wis. 79.

³ *Wells v. Wilcox*, 68 Iowa 708.

⁴ *Peterson v. Foli*, 67 Iowa 402.

⁵ *Game v. Whaley*, 43 Minn. 234.

⁶ *Wade v. Strachan*, 71 Mich. 459.

⁷ *Luce v. Moorhead*, 73 Iowa 498.

and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, in section 11, township number (134) one hundred and thirty-four, north of range (38) thirty-eight, eighty (39) acres in crass, (33) ackers in whead, and (6) ackers ods, all of said property." Other parts of the instrument clearly indicated it to be a mortgage on personal property. It was held valid and covered a crop of thirty-three acres of wheat, six acres of oats, growing, when the mortgage was executed, on the land described therein, in the possession of the mortgagor.¹

The description in a chattel mortgage was: "My tobacco crop, to be grown this year on my own land, and to contain eight acres, including one-third of the crop of G., to contain no less than three acres, and my one-third interest in J.'s land, to be grown this year." This was a sufficient description of the property and of the mortgagor's interest to admit oral evidence to cure any uncertainty.² This description is invalid for uncertainty: "All the grain, oats, wheat and corn raised" on certain land, but which fails to state the year or time in which the crops were or were to be raised.³ The following description is void for uncertainty: "Six hundred bushels of corn, growing, located and being on the W. $\frac{1}{2}$ of section thirty-six, township, south of Range 8, East. If said corn matures before the maturity of the note secured by this mortgage, the said Burnside to shuck the same, and any crops on the premises above described," the mortgagor to remain in possession of the corn; although there were more than one thousand bushels on the tract described, there was no separate identification of the part intended to be conveyed. Some of the corn was of good quality, while other parts were inferior in quality.⁴

§ 161. **As to Animals.**—The description of animals must be such as to put a *bona fide* purchaser from the mortgagor upon notice. Thus, a description as "two mare mules and

¹Strolberg v. Brandenburg, 39 Minn. 348.

²State v. Logan, 100 N. Car. 454.

³Barr v. Cannon, 69 Iowa 20.

⁴Souders v. Voorhees, 36 Kans. 138.

one horse mule," does not specify the property so as to put a purchaser from the mortgagor of one black horse mule and a dark mule, upon notice that the animals are the ones mortgaged, when the mortgagor had several farms on which he had mules.¹

So, a description is insufficient which describes cattle separately, as to color, age and name, but which contains no statement as to the present or past ownership, nor of the place where they are kept.² Property was described as "two brown mules, aged 8 and 12 years." A statement followed of the county in which it was situated, and also that it should remain in the possession of the mortgagee until default, or until the mortgagee should deem himself insecure. This was a sufficient description.³

A description was as follows: "One dark-bay horse, fifteen hands high, heavy made, with black mane, tail and legs, the closer to the hoofs the blacker the legs; star in the forehead on a level with the eyes, running upwards; stripe on the nose, extending to both lips; a little white streak on withers and a little spot just behind the withers;" held, not void for uncertainty in the description.⁴ So, also, a description of "one bay horse, seven years old, weight 1,150; one bay mare, nine years old, weight 1,250, * * * said property, until default in payment of the debt secured, to remain in possession" of the mortgagor, is sufficient.⁵

A description, "Sixty head of two and three-year-old steers, forty head of yearling steers; also sixty-five acres of standing corn," situated in a township and county, is not sufficient.⁶

When a horse is accurately described, the mere fact that it was not found at the place where the mortgage recited it was, will not vitiate the instrument.⁷

¹Stewart v. Jaques, 77 Ga. 365.

²Warner v. Wilson, 78 Iowa 719.

³Schmidt v. Bender, 39 Kans. 437.

⁴Adams v. Hill, 10 Kans. 627.

⁵Wheeler v. Becker, 68 Iowa 723.

⁶Caldwell v. Trobridge, 68 Iowa 150.

⁷Jones v. Workman, 65 Wis. 269.

Where a party owns just one hundred and eighty head of merino and Cotswold sheep, a chattel mortgage of the same is effective which describes them as one hundred and eighty head of merinos, owned and possessed by said party.¹

So, a chattel mortgage is sufficient and effective which describes the property as "the following cattle," giving the names by which they were registered in the American Short-Horn Herd-Book, "eighteen head of two-year-old steers, of various colors," and "one span of heavy, dark-bay mules," all kept on the farm of the mortgagors in a certain township.²

§ 162. **As to Farming Utensils.**—In describing farming utensils, the description should be sufficient to fully identify the article. But in those States where notice is sufficient to third parties, the notice may waive the necessity of a full enumeration in particular terms. Thus, in describing wagons, the clause was used, "11 Smith farm-wagons, 4 Ketchum farm-wagons," all of the wagons in the possession of the mortgagor. This was a sufficient description as to third parties having claims against the mortgagor.³

But the following description is too indefinite: "One buggy with fills, new, made by Taylor Brothers, Emmetsburg, and bought of them; one sulky, new, made by the Taylor Brothers."⁴

¹ *Chrisfield v. Neal*, 36 Kans. 278.

² *City Bank v. Ratkey*, 79 Iowa 215.

³ *Clapp v. Trobridge*, 74 Iowa 550.

⁴ *Ormsby v. Nolan*, 69 Iowa 130.

CHAPTER V.

PRESENT PROPERTY, OR INTERESTS IN ESSE.

ARTICLE I.—PRESENT INTEREST.

- 163. In General.
- 164. Rolling-Stock of Railroads.
- 165. Executory Interests.
- 166. Illinois Rule.
- 167. Special Interests.
- 168. Prohibited Articles.
- 169. In Violation of Statute.
- 170. General Rule—Identification.
- 171. Ratification of Invalid Mortgage.

§ 163. **In General.**—All property, real and personal, corporeal and incorporeal, may be subject to mortgage. Everything which may be considered property, whether by the technical language of the law denominated real or personal property, may be mortgaged, though a mere incident of property cannot be mortgaged alone and apart from it.

Bank stock is property, and may be mortgaged.¹ So, also, all claims growing out of, or adhering to, rights of action *ex contractu*, and interests in action, may be mortgaged for the benefit of creditors.² That is, all claims growing out of, or adhering to, property, rights of action for damages *ex contractu*, and interests in actions pending, may all be assigned or mortgaged for the benefit of creditors.³ But a party cannot mortgage causes of action growing out of personal wrongs of the debtor, because causes of action arising out of personal wrongs to the debtor, not being for the recovery of damages for property illegally taken out of his

¹ *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Huntzinger v. Phila. Coal Co.*, 11 Phila. (Pa.) 609.

² *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Leitch v. Hollister*, 4 Comst. (N. Y.) 211; *North v. Turner*, 9 S. & R. (Pa.) 244.

³ *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501.

possession, or unlawfully withheld from him, are not embraced by the reason or spirit of this rule of law, and may not, therefore, be legally mortgaged or assigned.¹

Mere choses or rights of action may be assigned or mortgaged for the indemnity or security, or to secure creditors. The legal title of the property will not pass, but the equitable title of it will vest in the mortgagee.² A person's choses in action would be included in a conveyance of all his personal property of every name and nature.³

But a party cannot mortgage property in which he has no interest.⁴

So, a party has no interest which he can mortgage, where he contracts with the owner to raise a crop on his land, in consideration that the owner give him so much of the crop as shall remain after taking out what was necessary to pay the owner of the land for supplies furnished him.⁵

The owner of chattels not in possession may make a valid mortgage of the same, if the person in possession professedly holds under him and has only a special property in the thing, such as that conferred by a pledge or lien. So, the owner of goods in the possession of the sheriff, seized under execution against such owner, may give a mortgage on the same which will be good as against the sheriff, when the judgment under which the execution issued is void for want of jurisdiction.⁶

The good-will of a business is property that may be sold or mortgaged. It is intangible property, in the nature of things, and can have no existence apart from a business of some sort that has been established and carried on at a particular place. It cannot be sold by judicial decree or other-

¹ *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501.

² *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501.

³ *Sherman v. Dodge*, 28 Vt. 26.

⁴ *Doyle v. Mizner*, 40 Mich. 160.

⁵ *Sentell v. Moore*, 34 Ark. 687. The words "goods and chattels," as used in the recording acts of West Virginia, do not embrace choses in action. *Tingle v. Fisher*, 20 W. Va. 497.

⁶ *Gardiner v. Bunn*, 132 Ill. 403.

wise, unless it be in connection with a sale of the business on which it depends.¹ Hence, the good-will of a business is property that may be mortgaged or sold in connection with the business, but it cannot be sold or mortgaged unless it be in connection with the sale of the business on which it depends, and of which it is a mere incident. Thus, where a newspaper, whose good-will has been mortgaged, in consolidation with another paper, and the name of the paper is changed, and a new corporation is formed to publish it, the lien of the mortgage does not attach to the good-will of the consolidated paper, though the new corporation occupied the old place of business for several years, and paid interest for several months on the mortgage debt.

Judge Thayer held that a mortgage of the "machinery, type, presses, cases, furniture, paper, forms and tools" of a newspaper company, together with the "good-will" of its business, cannot be foreclosed as to the good-will after all the tangible property covered by the mortgage has been alienated, worn out or destroyed, and the corporation has become consolidated with another newspaper corporation.²

A mere possibility or expectancy, not coupled with any interest in, or growing out of, property, cannot be made the subject of a mortgage.³

§ 164. **Rolling-Stock of Railroad Companies.**—Some of the States, by their constitutions, declare rolling-stock of railway companies personalty. Where there is no such declaration, the decisions conflict as to whether a chattel mortgage can be made on rolling-stock of railroad companies. In New York the rolling-stock of railroad companies is not a part of the realty, but retains the character of personal property. It does not become a part of the realty, so as to pass by conveyance of the land as part thereof, and a chattel

¹ *Robertson v. Quiddington*, 28 Beav. 529; 3 Pom. Eq. Jur. § 1355; *Story on Partn.* § 99; *Smith's Merc. Law* 188, and cases cited.

² *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 36 Fed. Rep. 722, U. S. Circuit Court, Missouri, E. D.

³ *Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570.

mortgage given on rolling-stock in this State is valid.¹ Thus, a mortgage was given by a railroad corporation on its real estate, chattels and franchises, but it was held that it did not cover its rolling-stock.² On the other hand, it has been held that rolling-stock, properly speaking, appurtenant to a railroad, is a part of the road, and a mortgage thereof, in connection with the road, if duly recorded as a mortgage of real estate, need not be recorded also as a chattel mortgage.³

In New Hampshire it has been held that the locomotive engines and freight and passenger cars of a railroad corporation are liable to attachment; when not in actual use, like other personal property,⁴ thus clearly classing them with personal chattels.

So, it is the rule of New Jersey, that a mortgage by a railroad company on its road-bed and franchises, together with its engines, cars and rolling-stock, so far as regards the latter class of property, is a chattel mortgage; that the engines, cars and rolling-stock of a railroad must be regarded as chattels, which have not lost their distinctive character as personalty by being affixed to and made part of the realty,⁵ and, of course, are subject to a chattel mortgage. And this is the view taken by the majority of the courts when not controlled by statute; that where the question has been directly presented, whether the rolling-stock of a railroad, included in a mortgage of its road-bed and franchises, is real or personal property, the rolling-stock is personalty and must be mortgaged as such.⁶

¹ *Hoyle v. Plattsburg, &c., R. R. Co.*, 54 N. Y. 314; *Randall v. Elwell*, 52 N. Y. 521; *Stevens v. Buffalo, &c., R. R. Co.*, 31 Barb. (N. Y.) 590.

² *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619.

³ *Farmers Loan and Trust Co. v. St. Joe, &c., R. R. Co.*, 3 Dill. C. C. 412.

⁴ *Boston, &c., R. R. Co. v. Gilmore*, 37 N. H. 410.

⁵ *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311; *State v. Somerville, &c., R. R. Co.*, 4 Dutch. (N. J.) 21.

⁶ *Stevens v. Buffalo, &c., R. R. Co.*, 31 Barb. (N. Y.) 590; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619; *Bement v. P. & M. R. R. Co.*, 47 Barb. (N. Y.) 104; *Randall v. Elwell*, 52 N. Y. 521; *Hoyle v. Plattsburgh, &c., R. R. Co.*, 54 N. Y. 314; *Chicago, &c., R. R. Co. v. Howard*, 21 Wis. 44; *Boston, &c., v. Gilmore*, 37 N. H. 410; *Coe v. Columbus, &c., R. R. Co.*, 10 Ohio St. 372; *City of Dubuque v. Ill. Cent. R. R. Co.*, 39 Iowa 56; and see *Marsh v. Burley*, 13 Nebr. 261; *Millard v. Burley*, 13 Nebr. 259.

So, Chief Justice Green declared that engines and cars are no more appendages of a railroad than wagons and carriages are appendages of a highway—both were equally essential to the enjoyment of the road—neither constituted any part of it.¹

In Alabama, Illinois, Missouri, Nebraska, Texas and West Virginia rolling-stock of railroads is declared by the constitution to be personal property.²

§ 165. **Executory Interests.**—The interest of a party in property which may be perfect by performance of an executory contract, may be the subject of a mortgage.³ But an unpaid legacy is not subject to a mortgage at law.⁴

A mortgage, by which a party transfers an account to be created in the future by one as customer, who was no party to the contract, and under no obligation to have his work done by the mortgagor, is at most a mere executory agreement, and does not convey to the mortgagee such title or interest in the account when created as will enable him successfully to contest the right of an attaching creditor.⁵

In Maine, property in the possession of the vendee, who is not to become the owner until he has fully paid for it, before the price is fully paid, if it be mortgaged by the vendor to another person, such person will acquire title to the property superior to that of the conditional vendee.⁶ So, also, in Alabama, a vendor may show by the terms of the contract of sale, that the title was to remain in him until the performance of the sale, or the purchase-money was paid, whether the mortgagee from the vendee had notice or not.⁷

In Massachusetts, a lessee, who is in possession of chattels under a lease, by the terms of which he is to pay for them

¹ *State Treasurer v. S. & E. R. R. Co.*, 4 Dutch. (N. J.) 21.

² *Wood on Railroads*, 1625.

³ *Forman v. Pröctor*, 9 B. Mon. (Ky.) 124.

⁴ *Kilbourne v. Fay*, 29 Ohio St. 264.

⁵ *Purcell v. Mather*, 35 Ala. 570.

⁶ *Everett v. Hall*, 67 Me. 497.

⁷ *Holman v. Lock*, 51 Ala. 287.

by installments, until the entire price is paid, and, in case of failure, the lessor may take possession of the chattels and terminate the lease—can, if he fails to complete the contract by non-payment of an installment, and the lessor has not taken possession, convey a good title to them as against an officer who attaches them as the property of the lessor.¹

A purchaser of machinery, who held it on condition that the title should remain in the seller until the price was paid, mortgaged it to a third person. On payment of the price, the mortgage became valid.²

§ 166. **Illinois Rule.**—A contract between the vendor and the vendee, that the title to the property shall not pass until fully paid for, is valid between them, though the property is given into the vendee's possession. But as to creditors and purchasers of the vendee, they can hold the property after sale or mortgage. The vendor cannot set up his title to defeat the *bona fide* rights of third persons.³

§ 167. **Special Interests.**—A mortgage of a chattel is valid, although, at the time, the mortgagor was not in possession, the person in possession holding under the mortgagor, and having only a special property in the chattel.⁴ An owner of chattels in possession, has a mortgageable interest in them, after default on a prior mortgage and before sale.⁵ But having possession of personal property, by permission of the owner, does not confer a power to sell or mortgage it, even in favor of a *bona fide* purchaser for a valuable consideration.⁶

§ 168. **Prohibited Articles.**—A mortgage of spirituous and intoxicating liquors passes the title therein, notwithstanding such be in violation of a statute, to this extent: No one can take them without authority, without becoming liable to an action for conversion.

¹Chase v. Ingalls, 122 Mass. 381.

²Crampton v. Pratt, 105 Mass. 255.

³McCormick v. Hadden, 37 Ill. 370; Ketchum v. Watson, 24 Ill. 591.

⁴McCalla v. Bullock, 2 Bibb (Ky.) 288.

⁵Smith v. Coolbaugh, 21 Wis. 427.

⁶Glaze v. Blake, 56 Ala. 379.

A sale, even when made under such circumstances as the law forbids, yet passes the property to the purchaser. The seller commits no offense for which he is punishable, but he does not retain his property in the article sold. A mortgage is a sale defeasible upon condition, but it passes the title subject to the right of redemption. As it is not criminal in the buyer to take an absolute title, it is not criminal for him to take a defeasible title.¹ And when the mortgagee has taken possession, the mortgage cannot be treated as void under the law prohibiting the sale of such property. The mortgage is valid as between the mortgagor and the mortgagee, and as between the mortgagee and creditors of the mortgagor. At common law, all contracts in violation of law are void. The law in such case will not aid either party, but leaves them to reap the reward of their own folly. If the contract is executory, it will not enforce it or give damages for non-performance; if executed, it will not undo what the parties themselves have done, by divesting the title that has passed. Hence, a mortgage of intoxicating liquor, under which possession has been taken by the mortgagee, cannot be treated as void under a prohibitory law as between the parties, nor as between the mortgagee and the creditors of the mortgagor, unless made to defraud such creditors.²

§ 169. **In Violation of Statutes.**—If a mortgage is given to secure a debt, and given to prefer a creditor, which action is in violation of the insolvent laws, it is void.³

So, where a mortgage is given to secure notes, part of the consideration being a debt contracted for intoxicating liquors sold in contravention of the statute, it is void. The notes are wholly void, and the mortgage is therefore wholly void.⁴

§ 170. **General Rule.**—In order to mortgage property so as

¹ *Cobb v. Farr*, 16 Gray (Mass.) 597.

² *Bagg v. Jerome*, 7 Mich. 145. See, also, *Breck v. Adams*, 3 Gray 569.

³ *Denny v. Dana*, 2 Cush. (Mass.) 160.

⁴ *Brigham v. Potter*, 14 Gray (Mass.) 522. See, also, *Fetherstone v. Hutchinson*, 3 Leon 128; *Cro. Eliz.* 199; *Perkins v. Cummings*, 2 Gray (Mass.) 258; *Waite v. Jones*, 1 Scott 735; *Scott v. Gillman*, 3 Taunt. 225; *Deering v. Chapman*, 22 Me. 488.

to create a lien upon it, such property must be ascertained and identified at the time of the execution of the instrument. Thus, where a party endeavored to mortgage a newspaper plant out of the State, calling it the "Chronicle Plant," this is not a sufficient identification of the subject-matter. Judge Lord says the evidence discloses that the property, whatever that was, to furnish the security, was not in the State or county, or in possession of the mortgagors, but was represented in a general way to be in a city in another State, or on the way to the State where the parties resided. That "in fact it does not appear definitely when the plant was ordered, and of what it consisted, and no one pretends to any specific information concerning it, or could, at the time the alleged agreement was made, enumerate in the most general way what it was that was subject to the lien." Such a mortgage could not, therefore, be made effective as a security against any specific property which the court could ascertain and identify, and was unavailing as a lien on any subject-matter.¹

And Judge Folger said: "There must be an identification of the property, so that the equitable mortgagee may say, with a reasonable degree of certainty, what it is that is subject to his lien."²

In order that a lien may arise, the agreement must deal with some particular property or interest, either by identifying it or by so describing it that it can be identified and made certain.³

But a mortgage of "all the personal property of which mortgagors are possessed," passes chattels in possession at the time of the mortgage's execution, and parol evidence is admissible to identify the same.⁴

§ 171. **Ratification of an Invalid Mortgage.**—A husband, to secure a debt of his own, mortgaged his wife's separate property. The mortgagee, in the presence of the wife, threatened

¹ Lee v. Cole, 17 Oreg. 559.

² Payne v. Wilson, 74 N. Y. 352.

³ 3 Pom. Eq. Jur. § 1235.

⁴ Harris v. Alden, 104 N. Car. 86.

to foreclose the mortgage, and demanded more security. Then the wife said to him, "What more do you want? You have a mortgage on all the personal property already." This was sufficient to authorize the jury to find that she had ratified the act of her husband in giving the mortgage.¹

ARTICLE II.—STATUTORY PROVISIONS.

- | | |
|-------------------|----------------------|
| 172. In General. | 181. New Hampshire. |
| 173. Arizona. | 182. New Mexico. |
| 174. Arkansas. | 183. Pennsylvania. |
| 175. California. | 184. By Act of 1887. |
| 176. Connecticut. | 185. Virginia. |
| 177. Illinois. | 186. Washington. |
| 178. Louisiana. | 187. West Virginia. |
| 179. Michigan. | 188. Wisconsin. |
| 180. Nevada. | |

§ 172. **In General.**—Some of the States have declared what personal property may be mortgaged. The following have statutory enactments :

§ 173. **Arizona.**—Upholstery and furniture used in hotels and public boarding-houses, when mortgaged to secure the purchase-money of the identical article mortgaged, and not otherwise ; also saw-mills, grist-mills, steamboat machinery, tools and machinery of machinists, of foundry-men and other mechanics ; steam boilers, steam engines, locomotives, engines, and the rolling-stock of railroads ; printing presses and other printing material ; instruments and chests of surgeons, physicians or dentists ; libraries of all persons ; machinery and apparatus for mining purposes ; growing crops, grain in store or field ; teams or implements pertaining to a farm, and stock of all kinds on a farm ; provided such mortgages be executed and recorded in the manner prescribed by this act. Stocks of merchandise only are excepted from mortgage.²

§ 174. **Arkansas.**—In this State no exceptions are made as

¹ *Merrill v. Parker*, 112 Mass. 250.

² *Com. Laws*, § 8644.

to personal property, but a statute provides that mortgages of crops planted or to be planted have the same effect as mortgages of things *in esse*. Before this statute, mortgages of crops to be planted were invalid.¹

§ 175. **California.**—Upholstery and furniture used in hotels, lodging or boarding-houses, to secure the purchase-money of the identical article, and not otherwise; steamboat machinery, machinery used by machinists, foundry-men and other mechanics; steam boilers, steam engines, locomotives, engines, and the rolling-stock of railroads; printing presses and other printing material; instruments of physicians, surgeons or dentists; professional libraries; instruments, negatives and fixtures of photograph galleries; mining machinery, growing crops, machinery, casks, pipes, tubs and utensils used in the manufacture of wine, fruit brandy and fruit syrup and sugar.²

A mortgage which cannot be governed by this act, comes under the common-law rules.³ The upholstery and furniture of a hotel or boarding-house must be used for the purpose of carrying on the business.⁴ But the furniture and fixtures of a saloon do not come under this enactment.⁵

The mortgagee must allege and prove that the articles of furniture and upholstery were actually used in connection with the business.⁶

A mortgage cannot be created by verbal agreement, as the Code⁷ provides that "a mortgage can be created, renewed or extended only by writing executed with the formalities required in the case of a grant of real property."

Growing crops⁸ can be mortgaged, but after they are har-

¹ Acts of 1874-75, p. 149.

² Civil Code, §§ 2955-2958.

³ *Wildman v. Radenaker*, 20 Cal. 615.

⁴ *Stringer v. Davis*, 30 Cal. 318.

⁵ *Gassner v. Patterson*, 23 Cal. 299.

⁶ *Stringer v. Davis*, 30 Cal. 318.

⁷ Civil Code, § 2922.

⁸ Civil Code, § 2955.

vested, the grain cannot be the subject of a chattel mortgage, as it would be in contravention of the Civil Code.¹

§ 176. **Connecticut.**—A chattel mortgage may be given on the following: Machinery, engine and implements situated and used in any manufacturing establishment; the machinery, engines, implements, &c., situated and used in a printing, publishing or engraving establishment; the furniture used by its owner in housekeeping; the furniture, fixtures, &c., of any hotel-keeper contained and used in the hotel occupied by him; hay, tobacco in the leaf, any piano, organ and melodeon, or any musical instrument used by an orchestra or band; the lines, appliances or machinery of any telegraph company, and brick in any kiln or brick-yard.²

The statute requirement that the mortgage shall contain a particular description of machinery, must be complied with when the machinery is left with the mortgagor; otherwise it is void as against attaching creditors.³

But when the mortgagee takes possession, this particular description is not necessary, either at common law or by statute.⁴

A mortgage of household furniture belonging to the owner of the building, and used by him, is valid, even if it constitutes the furniture of a hotel kept by him.⁵

§ 177. **Illinois.**—By the constitution of 1870 the rolling-stock of railroads is declared to be personal property, and is liable to execution and sale in the same manner as the personal property of individuals.⁶

When mortgaging the realty, franchises and other property of a railway in Illinois, as an entirety, the property thus mortgaged may be sold as an entirety under decree in equity, without any right of redemption, and such action is

¹ *Grangers v. Clark*, 84 Cal. 201.

² Gen. Stat. p. 359, § 7, and Acts of 1878, ch. 90.

³ *Gaylor v. Harding*, 37 Conn. 508.

⁴ *Howe v. Keeler*, 27 Conn. 538.

⁵ *Croswell v. Allis*, 25 Conn. 301.

⁶ Const. of 1870, art. XI. § 10.

not in conflict with the State constitution.¹ But before the adoption of the constitution of 1870, rolling-stock was considered as realty.² But this constitution does not change the rule that the mortgage made by a railway company, conveying after-acquired property, holds such property as against creditors obtaining judgments and executions after the company has taken possession of such property.³

Chattel mortgages on household goods and mechanics' tools must be foreclosed in a court of record. Chattel mortgages on household goods must be executed by both husband and wife.⁴

§ 178. **Louisiana.**—In this State chattel mortgages are unknown. But all movables, whether corporeal or incorporeal, may be pledged or pawned. The civil-law rule is adopted in this State, and personal security is governed accordingly.⁵

§ 179. **Michigan.**—The exemptions of personal property are as follows: 1. Spinning-wheels, looms and stoves put up for use in a dwelling-house. 2. A seat, pew or slip occupied by a householder or his family in any house or place of public worship. 3. Cemeteries, tombs and rights of burial in use as repositories of the dead. 4. All arms and accoutrements required by law to be kept by any person, and all wearing apparel of every person or family. 5. The library and school-books of every person and family, not exceeding in value \$150, and all family pictures. 6. To every householder ten sheep with their fleeces and the yarn or cloth manufactured from the same; two cows, five swine, and provisions and fuel for comfortable subsistence of such householder's family for six months. 7. To each householder all household goods, furniture and utensils, not exceeding in value \$250. 8. The tools, implements, material, stock, ap-

¹ *Hammock v. Loan and Trust Co.*, 105 U. S. 77.

² *Palmer v. Forbes*, 23 Ill. 301; *Hunt v. Bullock*, 23 Ill. 325; *Titus v. Mabee*, 25 Ill. 257; *Titus v. Ginheimer*, 27 Ill. 462; *Mich. Cent. R. R. Co. v. Chicago, &c.*, 1 Ill. App. 399.

³ *Scott v. Clinton, &c.*, R. R. Co., 6 Biss. C. C. 529.

⁴ *Laws of 1889*, tit. "Mortgages."

⁵ *Civil Code*, tit. "Pledges," §§ 3115, 3158.

paratus, team, vehicle, horses, harness or other things to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value \$250. 9. A sufficient quantity of hay, grain, feed and oats, whether growing or otherwise, for properly keeping for six months the animals in the several sections mentioned. And any chattel mortgage, bill of sale or other lien, created on any part of property above described, except such as mentioned in the eighth division, shall be void, unless such mortgage, bill of sale or lien be signed by the wife of the party making such mortgage or lien.¹

§ 180. **Nevada.**—All personal property, including growing crops, may be mortgaged, provided that a chattel mortgage upon a growing crop may be executed as well before as after the crop is planted.²

§ 181. **New Hampshire.**—All personal property is subject to mortgage. And it is provided by statute that crops matured or growing may be mortgaged.³

§ 182. **New Mexico.**—In this territory all personal property is subject to mortgage, excepting growing crops. Growing crops are made an exception by statutory provisions, and, of course, unplanted crops cannot be subject of a mortgage.⁴

§ 183. **Pennsylvania.**—By act of April 27th, 1855, it was made lawful for lessees of collieries, manufactories and other premises to mortgage their leases, with the buildings, machinery, &c. Leases of mines, &c., in Schuylkill county might be mortgaged under act of April 5th, 1853. An act was passed May 18th, 1876, allowing mortgages to be made of the following articles: Saw-logs, sawed lumber, laths, pickets, shingles, hewn lumber and spars, and petroleum or

¹ How. St. ch. 266.

² Laws of 1885, ch. 54.

³ Gen. Laws, ch. 137, § 1, p. 323.

⁴ See Gen. Laws of 1874, tit. "Mortgages."

coal oil, crude and refined, in tanks, reservoirs, barrels or other receptacles, in bulk; also, iron tanks and tank cars; iron ore, mined and prepared for use; pig-iron, blooms, rolled or hammered iron, in sheets or bars, manufactured slate and canal boats. This act was limited to a duration of five years. Except as provided in the statutes, mortgages of chattels are not sanctioned. They are mere pledges, and are not good as against creditors and third persons unless the mortgagee takes possession.¹

§ 184. **By Act of 1887.**—By act of April 28th, 1887, chattel mortgages were authorized of not less than \$500 upon iron ore mined and prepared for use, pig-iron, blooms and rolled or hammered iron, in sheets or in bars, iron and steel nails, steel ingots and billets, rolled or hammered steel, in sheets, bars or plates, and all steel and iron castings of every description not in place.

§ 185. **Virginia.**—Chattel mortgages and deeds of trust may be given upon personal property, as upon real estate.²

§ 186. **Washington.**—In this State, all personal property is subject to mortgage. But a mortgage of chattels exempt from execution is not valid, unless the wife of the mortgagor, if he be married, signs and executes the instrument with her husband.³

§ 187. **West Virginia.**—In this State, chattel mortgages are seldom used. Deeds of trust are almost universally used, and the law concerning such instruments prevails.⁴

§ 188. **Wisconsin.**—Chattel mortgages of exempt personal property, if made by a married man, must be signed by his

¹ Bismark Build. Ass'n v. Bolster, 92 Pa. St. 123.

² Code, ch. 117, §§ 4, 5.

A conveyance of a stock in trade to trustees, in trust to pay certain debts, with power of sale in the usual way of trade, to occupy the store where business was carried on, until default in the payment of any of the debt secured, and until any of the creditors should require the deed to be closed by sale, is fraudulent *per se*, and void as to creditors of persons conveying. *Addington v. Etheridge*, 12 Grat. (Va.) 436. This was decided in 1855.

³ Rev. Code, § 1986.

⁴ Code, ch. 76.

wife, if she be at the time a member of the family, in the presence of two witnesses, or it is absolutely void.¹

Chattel mortgages can operate only upon property in actual existence at the time of its execution.²

ARTICLE III.—FIXTURES.

- 189. When Buildings Become Personalty.
- 190. Fixtures May Remain Personal Property by Agreement Between the Parties.
- 191. Ohio Rule.
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- 209. What Is Appurtenant.
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§ 189. **When Buildings Become Realty.**—There may be a valid chattel mortgage of property which is generally treated as real estate. A building erected upon another's land, *prima facie*, is a fixture and part of the realty. But if an understanding exists between the parties that it may be removed at any time, it then becomes personalty. One deriving title from a person who had previously mortgaged a building so erected as personal property, is not in a position to insist, as against the mortgagee, that it is a part of the realty; nor is he at liberty to dispute the title of the mortgagor. Whenever one party owns real estate, upon

¹ Laws of 1887, ch. 268.

² Comstock v. Scales, 7 Wis. 159.

which there are fixtures belonging to another, with right of possession, the owner of the fixtures may mortgage them by a chattel mortgage. Thus, a chattel mortgage of an elevator erected under such an agreement is valid.¹

So, all buildings placed upon leased premises by the tenant, to be used for the purpose of trade and business, are, in law, deemed personal property and may be mortgaged as chattels, or levied on as personalty and sold upon execution.²

When a building is erected under an understanding or agreement that it may be removed at any time, it is then no part of the realty, and one deriving title from a party who had previously given a chattel mortgage on such building, is in no situation to insist, as against the mortgagee, that it forms part of the real estate.³ And where one owns land in fee, but which he had leased to the owner of a mill situated thereon, and then purchased the mill, this does not operate to extinguish the lien of an existing chattel mortgage upon the mill at the time of the purchase by the owner of the fee. The assignee of the mortgagee can enforce his rights as set forth in the mortgage.⁴

The law of recording a chattel mortgage or taking possession of the property by the mortgagee does not apply to leases of real estate. The omission to file any instrument transferring a lease as a security, or failure of the transferee to take possession of the lease or of the demised premises, does not render the transfer void as to creditors, or raise a presumption of a fraudulent intent.⁵

The priority of a lien of a chattel mortgage upon a frame building subsequently removed by the mortgagor to and upon other lands, is not defeated by a subsequent mortgage upon such other land, given by the same mortgagor to a

¹ *Deering v. Ladd*, 22 Fed. Rep. 575.

² *Lemar v. Miles*, 4 Watts (Pa.) 332; *Doty v. Gorham*, 5 Pick. (Mass.) 487; *Van Ness v. Pacard*, 2 Pet. (U. S.) 141; *Lanphere v. Lowe*, 3 Nebr. 131; *Goodenow v. Allen*, 68 Me. 308.

³ *Smith v. Benson*, 1 Hill (N. Y.) 176.

⁴ *Denham v. Sankey*, 38 Iowa 269.

⁵ *Booth v. Kehoe*, 71 N. Y. 341.

mortgagee having full knowledge of the prior chattel mortgage.¹

A building erected on the land of another by permission of the owner's agent, and sold several times independently of the land, one-half being bought by one who afterwards buys the land without disputing the title of the owner and occupant of the other half, is personal property.²

§ 190. **Fixtures May Remain Personal Property by Agreement Between the Parties.**—It is not held that parties may, by contract, make personal property real, or real personal, at law; but where an article, personal in its nature, is so attached to the realty that it may be removed without material injury to it or to the realty, the intention with which it is attached will govern. And if there is an express agreement that it shall remain personal property, or if, from the circumstances attending, it is evident it may be presumed that such was the intention of the parties, it may be held to have retained its personal character.³

So, if chattels have been mortgaged and the mortgage placed upon record, and then the chattels placed upon realty, upon which mechanics acquire a mechanics' lien, the constructive notice is sufficient, and the mortgagee of the chattels will hold them.⁴

And in general, when chattels are of such a nature as to retain their identity and distinctive characteristics after the annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not

¹ *Simons v. Pierce*, 16 Ohio St. 215.

² *Brown v. Corbin*, 121 Ind. 455. Buildings erected under an agreement with the owner of the land to convey it to the builder, provided he pay for it within a certain time, are not thus transformed into personalty, but are fixtures, and constitute a part of the real estate and are not subject to a chattel mortgage. *Eastman v. Foster*, 8 Met. (Mass.) 19.

³ *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kans. 314; *Coleman v. Lewis*, 27 Pa. St. 291; *Richardson v. Copeland*, 6 Gray (Mass.) 536; *Haven v. Emery*, 33 N. H. 66; *Sisson v. Hibbard*, 10 Hun (N. Y.) 420; *Robertson v. Corsett*, 39 Mich. 777; *Foster v. Prentiss*, 75 Me. 279.

⁴ *Sowden v. Craig*, 26 Iowa 162. See *Rogers v. Prattville, &c.*, 81 Ala. 483; *Crane v. Brigham*, 3 Stock. (N. J.) 29; *Trull v. Fuller*, 28 Me. 548; *Ballou v. Jones*, 37 Ill. 95; *Wade v. Johnston*, 25 Ga. 331; *Hill v. Wentworth*, 28 Vt. 428; *Manwaring v. Jenison*, 61 Mich. 117; *Pratt v. Whittier*, 58 Cal. 126; *Warner v. Kenning*, 25 Minn. 173.

materially injure the building, or destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation, will have the effect to preserve the personal character of the property between the parties to the agreement.¹ Hence, the proposition is well settled that one who purchases machinery with a view that it shall be annexed to or placed in a building of which he is the owner, and executes a chattel mortgage on the property so purchased, thereby evidences his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the realty.² And it is the policy of the law, except where the rights of innocent purchasers are concerned, to uphold such contracts in the interest of trade. The execution of a chattel mortgage by the owner of realty, upon machinery which he afterwards places in a building situated thereon, is regarded as a clear intention that the act of annexation shall not change or take away the character of the machinery as personalty until the debt secured by the mortgage has been fully paid.³

A provision in a chattel mortgage that, upon default of payment of the mortgage debt, the mortgagee may take possession of the mortgaged chattels and sell the same, if anything beyond the mortgage was needed, is equivalent to an express agreement that the property shall continue to be regarded as personalty. Judge Mitchell says that when the nature of the property admits of it, parties may, by convention, fix its character as personalty, as between themselves, after it is annexed to the freehold, and that a chattel mortgage is equivalent to an express agreement in that respect, and questions of the rights of the parties would be of easy solution but for the intervention of the rights of third persons.⁴

¹ *Rogers v. Cox*, 96 Ind. 157; *Price v. Malott*, 85 Ind. 266; *Hendy v. Dinkerhoff*, 57 Cal. 3; *Malott v. Price*, 109 Ind. 22; *Ewell on Fixt.* 66.

² *Eaves v. Estes*, 10 Kans. 314; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377.

³ *Tift v. Horton*, 53 N. Y. 377.

⁴ *Binkley v. Forkner*, 117 Ind. 176.

The authorities are not wholly in accord. In some jurisdictions the rule seems to be that an agreement between the owner of the realty and the vendor of chattels which are to be annexed thereto, concerning the character of the chattels, is valid, not only between the parties and against a prior mortgagee of the land, but also against a subsequent mortgagee or purchaser without notice, while other courts hold an essentially different effect to such agreements. Thus, it has been held that neither a precedent nor subsequent mortgagee of real estate can defeat the claim of one holding a chattel mortgage upon property which has been annexed to the mortgaged realty under an agreement that it shall continue to be regarded as personalty, because the agreement between the holder of the chattel mortgage and the owner of the realty, that the chattels shall retain their character as personalty, rebuts the presumption that they were intended as permanent accessories to the realty, and binds both prior and subsequent mortgagees.¹

But it has been held that a chattel mortgage taken upon certain machinery, in contemplation that the machinery was to be fastened to a building and annexed to real property owned by the mortgagor, was not protected as against a subsequent mortgagee of the real estate, who would hold the mortgaged chattels as a part of the mortgaged realty.²

So, an agreement between the owner of iron rails and a railroad company, that the rails should retain their character as chattels after they had been fastened to the road-bed, would be unavailing as against a previous mortgagee of the road or a purchaser without notice.³

No general rule exists which declares that machinery, upon which there is a chattel mortgage, becomes necessarily subject to an existing mortgage upon real estate to which it may afterwards be annexed with the consent of the mort-

¹ *Tift v. Horton*, 53 N. Y. 377; *Ford v. Cobb*, 20 N. Y. 344.

² *Pierce v. George*, 108 Mass. 78.

³ *Hunt v. Iron Co.*, 97 Mass. 279. See, also, *Stillman v. Flenniken*, 58 Iowa 450.

gagee, to the exclusion or postponement of a prior chattel mortgage. A prior mortgagee does not occupy the attitude of an innocent purchaser. The interests and rights of the holder of a chattel mortgage upon property which is annexed to realty, upon which there is an existing mortgage, must be determined by the practical application of equitable principles to the rights of the respective parties.

"Whether the chattel mortgage shall be postponed, notwithstanding the agreement between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real-estate mortgage as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage, that he permitted the property to be annexed to a freehold, from which it cannot be removed without diminishing or impairing an existing mortgage thereon."¹

§ 191. **Ohio Rule.**—In this State, it is held that, although the parties concerned may make a binding agreement that what would otherwise be a fixture shall be regarded as personalty, yet such an agreement will not affect the rights of a subsequent mortgagee of the realty without notice of it, and that the delivery and filing of a chattel mortgage upon the property which is the subject of the agreement does not constitute the required notice.²

§ 192. **Intent Alone Not Sufficient to Convert a Chattel Into a Fixture.**—Intent alone will not convert a chattel into a fixture.³ Where a chattel is annexed after giving the mortgage on the realty, and is of a doubtful nature, there must be stronger evidence, to make it a permanent accession to the

¹ *Binkley v. Forkner*, 117 Ind. 176.

² *Case Manufacturing Company v. Garver*, 45 Ohio St. 289; and see *Fortman v. Goepper*, 14 Ohio St. 558.

³ *Thielman v. Carr*, 75 Ill. 385; *Arnold v. Crowder*, 81 Ill. 56; *Treadway v. Sharon*, 7 Nev. 37; *Walford v. Baxter*, 33 Minn. 12; *Farmers Loan and Trust Co. v. Minneapolis, &c., Works*, 35 Minn. 543.

freehold, than if it was annexed prior to or at the time of the execution of the real-estate mortgage.¹

It is necessary to keep in view the distinction between chattels whose completeness and identity, as separate and distinct articles, may be preserved, notwithstanding their annexation, and those which necessarily become absorbed and merged in the realty.²

Unless the detachment of mortgaged chattels would materially affect the security of the real-estate mortgagee by depreciating the value of the mortgaged property, or by dismantling it of any important feature at the time the mortgage was taken, the precedent real-estate mortgage only attaches to the actual interest which the mortgagor has in the personal chattels subsequently annexed, at the time of their annexation.³

§ 193. **When Fixtures Become Realty—Rule of Some Courts.**—It is held that there are several tests which aid in determining the question whether articles personal in their nature have acquired the character of real estate: 1. Actual annexation, which must be of a permanent character, except in case of those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character. 2. Adaptability to the use of the freehold. 3. The intention of the parties at the time of making the annexation. In the case of machinery, the circumstance that it may or may not be removed from the freehold without great injury to the building containing it or to itself, is not now deemed to be controlling. But when a building is constructed for milling or manufacturing purposes, and is so employed, all the machinery and appliances used in connection with the business, whether attached in any way to the realty or not, become a part of the realty, and a mortgage

¹ *Tillman v. De Lacey*, 80 Ala. 103; *Clore v. Lambert*, 78 Ky. 224; *Rowand v. Anderson*, 33 Kans. 264.

² *Porter v. Steel Co.*, 122 U. S. 269; *Durham v. Railway Co.*, 1 Wall. (U. S.) 254; *Railway Co. v. Cowdrey*, 11 Wall. (U. S.) 459.

³ *United States v. Railroad Co.*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 235.

simply on the land carries with it such machinery and appliances, even without any mention being made thereof. Judge Hunt says: "I am of the opinion that upon general principles, that is, unless there be some specific agreement to the contrary, or some circumstances controlling the general rule, that the boilers and engines, shafting and gearing, became a part of the realty, and passed to the plaintiff upon his purchase."¹ The remedy of the party is against those that wrongfully convert the personal property into real property.²

So, the owner of real estate with a flouring mill thereon, which was subject to a mortgage duly recorded, procured new machinery therefor on credit, upon agreement that title to the machinery should not pass until it was paid for. The machinery was attached to the realty, as was intended. It was held that a purchaser upon foreclosure took title to the machinery as against the vendor of it, notwithstanding the contract and a failure to pay for it. The court said personal property, thus voluntarily affixed to mortgaged real estate, necessarily becomes subject to the mortgage; there is no semblance of equity against the mortgagee in favor of the party who thus permits his personalty to become real estate, having notice of the mortgage by the record. Property which has thus become real estate, cannot be changed again so as to become personalty, without the consent of the mortgagee.³

So, the machinery of a woolen mill, consisting of looms, carders, breakers, condensers, is fixtures, and included in a trust deed covering the realty.⁴

The Pennsylvania court holds that a mortgage of a ma-

¹ *Voorhees v. McGinnis*, 48 N. Y. 278; *Pierce v. George*, 108 Mass. 78; *Farrar v. Stackpole*, 6 Greenl. (Me.) 154; *Parsons v. Copeland*, 38 Me. 537; *Winslow v. Mer. Ins. Co.*, 4 Met. (Mass.) 306; *Stockwell v. Campbell*, 39 Conn. 362; *Millikin v. Armstrong*, 17 Ind. 456; *Queen ex rel. v. Lee*, 1 L. R., Q. B. 241; *Holland v. Hodgson*, 7 L. R., C. P. 328.

² *Fryatt v. Sullivan Co.*, 5 Hill (N. Y.) 116.

³ *Bass Foundry v. Gallentine*, 99 Ind. 525.

⁴ *Ottumwa W. Mill Co. v. Hawley*, 44 Iowa 57.

chine shop includes all its fixtures as such, and the mortgagor cannot remove them to the injury of the mortgagee. Thus, a mortgagor having sold a lathe belonging to a mortgaged machine shop, it was decided that the mortgagee could hold it.¹

§ 194. **Another Rule.**—The decisions are not uniform on this question. Some courts lay down the rule that the criterion of a fixture, applicable to a mill or manufactory, is the resultant of three requisites: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Application to a use or purpose to which that part of the realty with which it is connected is appurtenant. 3. The intention of the party making the annexation to make a permanent accession to the freehold.²

And, as between mortgagor and mortgagee of a large brick building, certain boilers, engines, shafting and steam-pipes for heating purposes, the latter fastened along the walls with wrought-iron spikes, were held to be part of the realty, although called personal property in a deed and bill of sale to the mortgagor.³

§ 195. **General Rule Between the Parties.**—The general rule between the mortgagor and the mortgagee is that annexations to the real estate pass to the mortgagee, unless by express terms the mortgagor excepts them from the terms of the conveyance;⁴ and this rule applies to subsequent annexations to the property.⁵

¹ *Hoskin v. Woodward*, 45 Pa. St. 42.

² *Teaff v. Hewitt*, 1 Ohio St. 511; *Keve v. Paxton*, 26 N. J. Eq. 107; *Capen v. Peckham*, 35 Conn. 88; *Brennan v. Whitaker*, 15 Ohio St. 446; *Crane v. Brigham*, 11 N. J. Eq. 29.

³ *Quinby v. Manhattan, & Co.*, 24 N. J. Eq. 260. See, also, *Blancke v. Rogers*, 26 N. J. Eq. 563; *Hutchinson v. Kay*, 23 Beav. 413; *Potter v. Cromwell*, 40 N. Y. 287; *McRea v. Bank*, 66 N. Y. 489; *Ewell on Fixt.* 21; *Tyler on Fixt.* 114.

⁴ *Arnold v. Crowder*, 81 Ill. 56; *Merritt v. Judd*, 14 Cal. 59; *Union Bank v. Emerson*, 15 Mass. 159; *Maples v. Millon*, 31 Conn. 598; *Pea v. Pea*, 35 Ind. 387; *Quinby v. Manhattan, & Co.*, 24 N. J. Eq. 260; *McRea v. Nat. Bank*, 66 N. Y. 489; *Winslow v. Mer. Ins. Co.*, 4 Met. (Mass.) 306; *Hoskins v. Woodward*, 45 Pa. St. 42; *Longbottom v. Berry*, 5 L. R., Q. B. 123; *Hitchman v. Walton*, 4 M. & W. 409; *Ex parte Belcher*, 4 Dea. & Ch. 703; *Longstaff v. Meagoe*, 2 A. & E. 167; *Walmsley v. Milne*, 7 C. B. (N. S.) 115.

⁵ *Wood v. Whelen*, 93 Ill. 153; *Snedeker v. Warring*, 12 N. Y. 170; *Lynde v. Rowe*, 12 Allen (Mass.) 100; *Corliss v. McLagin*, 29 Me. 115; *Wright v. Gray*, 73 Me. 297; *Bond v. Cope*, 71 N. Car. 97.

Thus, when one purchasing machinery gives a chattel mortgage for its price, and orally agrees that it shall be treated as personalty until paid for, and the realty to which it is afterwards attached by him will not be injured by its removal, the machinery will be considered as personal property, as against a prior mortgagee of the realty. So it will be considered, as against a subsequent mortgagee of the realty, whose mortgage, after describing the land, provides that the mortgagor also mortgages and warrants all machinery, particularly enumerating it, and that none of the same is to be removed until the mortgage is paid, as such mortgage treats the machinery as personalty, and is therefore subject to the prior chattel mortgage.¹

In general, different rules prevail, dependent on the relation of the parties, whether of grantor or grantee, landlord and tenant, or executor and heir, and also upon the uses for which the things are intended, whether for the purpose of agriculture or trade or manufacture. But as between mortgagor and mortgagee, the same rules prevail, substantially, as between vendor and vendee.² There is no material difference whether the chattel is attached before or after the execution of the mortgage, except stronger evidence of intention to annex is required where the chattel is placed subsequently to the execution of the mortgage.³

It may be regarded as the settled rule that any chattel permanently annexed to the freehold, and which cannot be severed without material injury to the premises, becomes a part of the realty, irrespective of the intention with which it was attached.⁴

It is, however, held, and rightly, too, that it may be required, by the future growth and extension of manufacturing industries, that the requisite of physical attachment in or to the soil be relaxed to the extent that the question of fixtures

¹ *Binkley v. Forkner*, 117 Ind. 176.

² *Walmsley v. Milne*, 7 C. B. (N. S.) 115; *Maples v. Millon*, 31 Conn. 598; *Quinby v. Manhattan, &c.*, 24 N. J. Eq. 260; *M'Kim v. Mason*, 3 Md. Ch. 186.

³ *Gardner v. Finley*, 19 Barb. (N. Y.) 317.

⁴ *Harkness v. Sears*, 26 Ala. 493.

vel non shall depend on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intention of those concerned in the act.¹ But, while it is not essential to a fixture that the connection with the freehold shall be to such degree that it cannot be severed without breaking or lasting injury to the premises, actual annexation to some degree and in some mode, though it may be slight and indirect or constructive, ordinarily is regarded as requisite.²

The weight of authority is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purpose for which it is held or employed, however slight or temporary the connection between them.³

, An important case was decided in Alabama. An engine was put on the land by one of the mortgagors after the making of the mortgage. It was an upright engine and rested on brick or plank on the ground, being sustained in place by its own weight. A house was erected over it, the sills of which rested on the ground, not being set into the soil. The engine was connected by a band with the gin, situated in a house about eighty feet distant. The engine could not be moved from the house without breaking the house for that purpose. It was used to furnish motive power for ginning the cotton raised on the premises and the cotton of other persons for toll. The court held that the intention must control, the *onus* being on the mortgagee of the land to show that the mortgagor intended that the engine should be a permanent accession to the freehold.⁴

A frame building erected by the side of a mill, for use as an office, in connection with the mill, is part of the realty, although erected after the mortgage was given, intended to be temporary only and to be ultimately removed, and not

¹ Winslow v. Mer. Ins. Co., 4 Met. (Mass.) 306; Meig's Appeal, 62 Pa. St.. 28; Wright v. Gray, 73 Me. 297.

² Tillman v. De Lacy, 80 Ala. 103.

³ 2 Smith's Lead. Cas. 221.

⁴ Tillman v. De Lacy, 80 Ala. 103.

attached to the mill, nor fixed to the ground, but resting upon wooden blocks sitting upon the surface of the earth.¹

So, the boilers and steam engine in a marble-mill are fixtures.²

§ 196. **Machinery—Physical Annexation.**—The weight of authority holds that physical annexation to the realty is necessary to make machinery a part of the freehold.³ While physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where such property is the main agent or principal thing in prosecuting the business to which the realty is adapted, being considered a part of the realty for any purpose. To make it a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or at least it must be mechanically fitted, so as in ordinary understanding to constitute it a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure or machine which is attached to the freehold, and without the erection, structure or machine would be imperfect or incomplete.⁴

§ 197. **Agreement Between the Parties.**—The agreement made by the parties will control them, unless the articles are of such a character that their detachment would involve a destruction or great injury to the realty, as such annexation might well be regarded as an abandonment of the lien by him who impliedly assents to the annexation; otherwise the agreement will control. Thus, an engine and boiler were purchased by the chattel mortgagor, who executed a chattel mortgage on them for the price, payable at a certain date. He failed to pay at the time specified, and gave a new chat-

¹ *State Bank v. Kercheval*, 65 Mo. 682.

² *Sweetzer v. Jones*, 35 Vt. 317; and see *Burnside v. Twitchell*, 43 N. H. 390; *Coleman v. Stearns Man. Co.*, 38 Mich. 30; *Roberts v. Dauphin Bank*, 19 Pa. St. 71; *Ex parte Cotton*, 2 M., D. & D. 725; *Ex parte Belcher*, 4 Dea. & Ch. 703; *Græme v. Cullen*, 23 Gratt. (Va.) 266.

³ *Farmers Loan and Trust Co. v. Minneapolis, &c., Works*, 35 Minn. 543; *Burnside v. Twitchell*, 43 N. H. 390.

⁴ *Walford v. Baxter*, 33 Minn. 12.

tel mortgage in lieu, payable at a time named, but before this date of payment he gave a real-estate mortgage on the property on which the engine and boiler were situated. It was decided that the real-estate mortgage could not cover them to the exclusion of the chattel mortgage lien.¹

Accordingly, where a chattel mortgage was given for the price of a portable engine and saw-mill, it was agreed that the property was to continue as personalty. It was placed on land owned by one of the mortgagors, in a mill, in such a manner that when the supply of lumber was exhausted there it could be easily removed elsewhere, which was done several times, and the engine was often taken out for threshing. Under these circumstances, the property remained as personalty, and could not pass to the mortgagee of the real estate.²

A vendor of an engine, boiler and machinery, knowing that they were to be annexed to realty, took a chattel mortgage for a part of the price, but failed to register it. The mortgagor of the chattels annexed them to the real estate, on which he had given a mortgage. It was held by a divided court that the lien of the chattel mortgage would be protected so far as it would not diminish the security which the real-estate mortgagee would have had if the annexation had not been made.³

A saw-mill which is subject to a chattel mortgage does not become a fixture, under a provision of a contract that the buildings or improvements placed or made upon the premises shall remain thereto as further and additional security for the execution of the covenants therein contained, unless the removal of the said improvements or buildings is consented to in writing by the owner of the land, and the title to such mill does not vest in him.⁴

§ 198. When the Chattels Are to Be Annexed to the Realty.—

¹ *Sword v. Low*, 122 Ill. 487. See *Kribbs v. Alford*, 120 N. Y. 519.

² *Henkle v. Dillon* 15 Oreg. 610.

³ *Campbell v. Roddy*, 44 N. J. Eq. 244.

⁴ *Burrill v. Wilcox Lum. Co.*, 65 Mich. 571.

When chattels are so annexed to the realty that they cannot be removed without destroying or injuring the land, they cannot be removed. Thus, the owner of a machine shop gave a chattel mortgage on the machinery before it was set up. After setting up the machinery in a permanent manner, he gave a real-estate mortgage on the shop and machinery. Under these circumstances, the chattel mortgage was rendered unavailable.¹

But if machinery or other chattels are not annexed to the realty in a permanent manner, it would be sufficient evidence of the intention of the parties that they are to remain as personalty.²

Where one purchases machinery, giving a chattel mortgage for its price, and orally agrees that it shall be treated as personalty until paid for, the realty to which it is attached afterwards by him could not be injured by its removal; the machinery will be considered as personalty as against a prior mortgagee of the realty, and against a subsequent mortgagee of the realty, whose mortgage, after describing the lien, provides that the mortgagor also mortgages and warrants all the machinery (particularly enumerating it), and that none of the same shall be removed until the mortgage is paid.³

§ 199. **Incorporated With the Realty.**—When chattels become incorporated with the realty, they become a part of it, no matter how incorporated. Thus, a mortgagor planted trees on the mortgaged premises, and gave a chattel mortgage on them, which was duly recorded. Afterwards the real-estate mortgage was foreclosed, and the purchaser of the realty took title to the trees.⁴

There can be a constructive incorporation. Thus, when the principal part of the machinery is permanently annexed, such part of it as may not be so physically annexed, but which, if removed, would leave the principal thing unfit for

¹ *Price v. George*, 108 Mass. 78.

² *Sisson v. Hibbard*, 75 N. Y. 542; *Eaves v. Estes*, 10 Kans. 314; *Ford v. Cobb*, 20 N. Y. 344.

³ *Binkley v. Forkner*, 117 Ind. 176.

⁴ *Adams v. Beadle*, 47 Iowa 439. See, also, *Maples v. Millon*, 31 Conn. 598.

use, and would not of itself, and standing alone, be well adapted for general use elsewhere, is constructively annexed.¹ But where machinery of a cotton mill is fastened to the floor by nails and screws, or held in position by cleats, it is no part of the realty, and may be mortgaged as personalty.² But if the machinery was permanently attached, it would be otherwise.³

§ 200. **Improvements by Mortgagor.**—Where a mortgagor left in possession improves the mortgaged premises, after the execution of the mortgage, by the erection of new works and the introduction of new machinery, which are intended to be permanently annexed to the freehold, he cannot remove such fixtures and thus impair the increased security, and it seems that this rule applies even to trade fixtures.⁴ Thus, an engine and machinery for a flouring mill erected by a lessee of the demised premises, securely attached by bolts and screws thereto, are fixtures as between him and his attaching creditors, notwithstanding an agreement between the lessor and lessee that he should be at liberty to remove the machinery upon the expiration of the lease.⁵

Fixtures erected by the tenant of the demised premises for the purpose of carrying on his trade, being accessory to the enjoyment of the term, are personal property during the continuance of the term.⁶

That the chattels shall remain permanently, it is necessary, as held by some courts, that they shall be so annexed to the reality that they cannot be removed without injuring the freehold or substantially destroying their own value.⁷

If the fixture be annexed to a building which is a personal

¹ *Dudley v. Hurst*, 67 Md. 44.

² *Keeler v. Keeler*, 31 N. J. Eq. 181. S. P., *Godard v. Gould*, 14 Barb. (N. Y.) 662; *McEntee v. Scott*, 2 Thomp. & C. (N. Y.) 284; *Gale v. Ward*, 14 Mass. 352; *Sturgis v. Warren*, 11 Vt. 433.

³ *Frankland v. Moulton*, 5 Wis. 1.

⁴ *Foote v. Gooch*, 96 N. Car. 265.

⁵ *McNally v. Connolly*, 70 Cal. 3.

⁶ *Kile v. Giebner*, 114 Pa. St. 381.

⁷ *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377; *Kinsey v. Bailey*, 9 Hun (N. Y.) 452.

chattel, then the fixture will be included in a chattel mortgage on the building. Thus, a track scale, used mainly in the business of an elevator, and erected for that purpose, which is closely connected with a hopper, from which grain can be taken by means of conveyors to and from the elevators, and which is joined to the same by visible framework, is a fixture to the building, within the meaning of, and passes by a sale under, a chattel mortgage on an elevator and other buildings upon certain leased premises, "with the machinery therein, and all the fixtures thereto belonging." The fact that the elevator is a chattel, and not part of the realty, and that the scale is not on the leased premises but adjacent thereto, is immaterial. Judge Granger says that the intent had much to do in determining whether the scale was a fixture. He says the testimony shows that the scale was bought for use with the elevator, and, after being adjusted, it was mainly used for the purpose of carrying on the business of the elevator; that it was as much a part of the elevator, for the purposes of the business, as the machinery of the elevator, and for such purposes as arose closely connected therewith. Having settled that the scale was a fixture to the elevator, it passed with it under a chattel mortgage.¹

§ 201. **When Mortgage Personalty is Annexed to Realty.**—If personal property, such as machinery, by consent of the mortgagee, be annexed to the realty, then the intention and agreement of the parties have much to do with the determination of the question whether it retains its character as personalty and subject to the first lien of the chattel mortgage.²

§ 202. **Severed Fixtures.**—A mortgage of a farm covers poles used in raising hops thereon, though brought thereto after its date, and the mortgagor's lien is superior to that of one who, after the removal of the poles from the farm, took a chattel mortgage thereof, to secure an antecedent debt.³ In

¹ McGorrick v. Dwyer, 78 Iowa 279.

² Potter v. Cromwell, 40 N. Y. 287; Tift v. Horton, 53 N. Y. 377; Shelden v. Edwards, 35 N. Y. 279.

³ Sullivan v. Toole, 26 Hun (N. Y.) 203.

Kentucky, if chattels are attached to the realty by the vendor or mortgagor, after the execution of the deed or mortgage, and are not mentioned therein, they will not be subject to the lien, although so attached that a removal will impair the lien.¹

Upon a bill being filed by the mortgagee under a mortgage on an opera-house, to enjoin a foreclosure of a chattel mortgage of the opera-house chairs contained in such house, it was held that it was evident that it was the intention of the mortgagor that the chairs should remain personal property, and that a new mortgage could be given at the expiration of the first.²

Cotton machinery, though fastened to the floor by nails and screws, or held in position by cleats, is personal property, and will pass under a chattel thereon as against a mortgage of the real estate subsequently given.³

§ 203. **Fixtures and Personalty on Another's Realty.**—Where one owns real estate upon which there are fixtures which belong to another, who has the right of possession of them, such owner may give a chattel mortgage on them.⁴

So, grass growing is, in general, a parcel of the realty, yet, when it is owned by one who does not also own the land, it is personal property, and may be mortgaged as such.⁵ So, a tenant of a farm who has set out wine plants during his tenancy, may mortgage them by a chattel mortgage, and the mortgagee's title will take preference to the vendee of the landlord.⁶

§ 204. **Estoppel.**—Parties can be estopped by their agreement to claim fixtures as part of the realty. Where a real-estate mortgage was given with a verbal agreement that the

¹ *Clore v. Lambert*, 78 Ky. 224.

² *Adrews v. Chandler*, 27 Ill. App. 103.

³ *Keeler v. Keeler*, 31 N. J. Eq. 181.

⁴ *Cook v. Corthell*, 11 R. I. 482; *Williams v. Briggs*, 11 R. I. 476; *Walker v. Vaughn*, 33 Conn. 577; *Gregg v. Sanford*, 24 Ill. 17; *Titus v. Mabee*, 25 Ill. 257; *Chapin v. Cram*, 40 Me. 561.

⁵ *Smith v. Jenks*, 1 Denio (N. Y.) 580; 1 Comst. 90.

⁶ *Wintermute v. Light*, 46 Barb. (N. Y.) 278.

mortgagor should erect a saw-mill on the premises, and did thus erect said mill, but gave a chattel mortgage on the engine and machinery, six months after the real-estate mortgage, to secure the purchase price, these chattels did not become a part of the realty and the chattel mortgage could hold them.¹

A vendor sold his real estate and took a mortgage back. At the same time, by bill of sale, he sold his chattels. The chattels were mortgaged by the vendee, and it was held that between the vendor and the mortgagee of the personal property under the agreement, it must be regarded as personalty and not subject to the real-estate mortgage.²

§ 205. **Evidence of Estoppel.**—If the owner of machinery and other things in the nature of fixtures, which may be easily removed without injury to the realty, treats them as chattels, and executes a chattel mortgage covering them, he thus estops himself from asserting as against the mortgagee that they are real estate, and the mortgagee may introduce the mortgage in evidence to show his right to the possession of the chattels, without putting in issue the title to the real estate.³

§ 206. **Priority—Notice.**—A chattel mortgage upon machinery which afterwards becomes fixtures, with knowledge and consent of the mortgagee, will not be affected by the lien of a mechanic, having notice of the facts, for work done on the mill; and no person chargeable with notice can, by purchase of the realty or otherwise, acquire from or through the mortgagor any title to the said fixtures paramount to the mortgagee. This is so when the property is a legitimate subject for fixtures and is that class of property of which the law permits parties to contract so as to control, as between themselves, its character. The mortgaging of it as personal property would, as between the parties and those having

¹ *Crippen v. Morrison*, 13 Mich. 23.

² *Fortman v. Goepper*, 14 Ohio St. 558. See, also, *Frederick v. Devol*, 15 Ind. 357; *Ford v. Cable*, 20 N. Y. 344.

³ *Corcoran v. Webster*, 50 Wis. 125; *Smith v. Benson*, 1 Hill (N. Y.) 176.

notice thereof, make it such. Of course a different rule would obtain in relation to bricks, lime, boards, beams and the like, used in the construction of a house. These, by such use, lose their individuality and become absorbed in and made a part of, rather than simply annexed to the realty.¹

The priority of lien of a chattel mortgage upon a frame building subsequently removed by the mortgagor to and upon other lands, is not defeated or affected by a subsequent mortgage upon such land, given by the same mortgagor to a mortgagee having full knowledge of the prior chattel mortgage.² When the annexation of fixtures to a mill was made by the owner with the consent of the holder of a chattel mortgage upon the property so annexed, such mortgage, though duly filed and renewed, is inoperative as against a *bona fide* mortgagee of the real estate without notice. Actual notice of the severance before the making of the real-estate mortgage, or notice of a binding agreement to sever, is required in such case to deprive a mortgagee of the freehold of the right to the fixtures.³

(Fixtures attached to the real estate by the owner, so as to become a part thereof, between vendor and vendee, pass to the vendee of the real estate, free of the lien of a prior mortgage of the same, as personal property, of which vendee had no notice. A purchaser, in searching the title to real estate, is not required to examine the records of chattel mortgages.⁴

§ 207. **Divesting Lien.**—One who purchases machinery on which there is a valid chattel mortgage cannot divest the lien by attaching such machinery as a fixture in a roller mill.⁵ So, also, a chattel mortgage is superior to a prior real-estate mortgage, in common form, covering the same chattels,

¹ *Sowen v. Craig*, 26 Iowa 156.

² *Simons v. Pierce*, 16 Ohio St. 215.

³ *Brennan v. Whittaker*, 15 Ohio St. 446.

⁴ *Bringholff v. Munzenmaier*, 20 Iowa 513.

⁵ *Grand Island Banking Co. v. Frey*, 25 Nebr. 66.

where the chattel mortgagee is in the position of an innocent purchaser.¹

§ 208. **Mortgaged Property Being Attached to the Realty.**—When a chattel mortgage is given on machinery which is afterwards attached to the realty, but in such a way as to be easily removed without injury to the freehold, it will be valid against a prior real-estate mortgage of the realty.² But a mortgage of a factory *eo nomine* includes, *ex vi termini*, all machinery and other articles essential to the factory then in place.³

§ 209. **What Is Appurtenant.**—Where the conveyance is of a mill or factory *eo nomine*, with the privileges and appurtenances, if the article in question is an essential part of the mill or factory, it is included in the term, and passes therewith, whether real or personal property.⁴ Thus, the property as described in the mortgage was, “one frame grain elevator warehouse, * * * with all the appurtenances thereto belonging.” Under this description a party in interest claimed title to an engine-house, together with the engine and boiler, complete; also an office building and a stationary Fairbanks’ scale, the former situated fifty feet and the latter over one hundred feet distant from the warehouse, and entirely disconnected therefrom. This property was not appurtenant nor could it pass to the mortgagee under the general term “appurtenances thereto belonging.”⁵

¹ Howard v. Witters, 60 Vt. 578.

² First Nat. Bank v. Elmore, 52 Iowa 541; Tiff v. Horton, 53 N. Y. 377; Eaves v. Estes, 10 Kans. 314; Henry v. Van Branstein, 12 Daly (N. Y.) 480; Keeler v. Keeler, 31 N. J. Eq. 181; Miller v. Wilson, 71 Iowa 610. But see Voorhees v. McGinnis, 48 N. Y. 278; Pierce v. George, 108 Mass. 78.

³ Shelton v. Ficklin, 32 Gratt. (Va.) 727; Delaware, &c., R. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452; Voorhis v. Freeman, 2 W. & S. (Pa.) 116; Hoskin v. Woodward, 45 Pa. St. 42.

⁴ Farrar v. Stackpole, 6 Me. 154; Lathrop v. Blake, 3 Foster (N. H.) 46; Baldwin v. Walker, 21 Conn. 168; Hoskins v. Woodward, 45 Pa. St. 42; Pickrell v. Carson, 8 Iowa 544.

⁵ Frey v. Drahos, 6 Nebr. 1.

ARTICLE IV.—CHATTELS REAL.

210. Leases and Similar Instruments.

§ 210. **Leases and Similar Instruments.**—The provisions of the statutes in relation to filing chattel mortgages do not apply to leases of real estate. Such instruments are not usually the subject of a mortgage. The statutory provisions relate specially to goods and chattels which can be removed from one place to another, and the possession thereof changed, and not to a chattel real or a chose in action.

The filing of a chattel mortgage, therefore, as to a chattel real would not be necessary and of no consequence whatever. There could be no such change of possession of such an instrument as is contemplated in regard to ordinary chattels. The omission to file an instrument transferring the same as a mortgage would not be a violation of the statutes in relation to filing chattel mortgages or establish a case of a fraudulent transfer of itself, with the intent to hinder, delay or defraud creditors.¹

An assignment of a lease, being not an absolute but conditional transfer, subject to be defeated, before the expiration of the term, by the performance of the conditions, is a mortgage, and the statute providing for filing chattel mortgages has no application to a mortgage of an interest in real estate.²

A chattel real can be sold only as real estate.³

¹ *Booth v. Kohoe*, 71 N. Y. 341.

² *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474.

³ *Ex parte Wilson*, 7 Hill (N. Y.) 150.

CHAPTER VI.

AFTER-ACQUIRED PROPERTY, OR INTERESTS IN FUTURO AND IN POSSE.

ARTICLE I.—THE DOCTRINE OF THE LAW.

- 211. At Common Law.
- 212. Between the Parties.
- 213. General Rule.
- 214. Verbal Agreement.
- 215. Natural Increase.
- 216. The Young of Female Animals.

§ 211. **At Common Law.**—At common law a chattel mortgage can only operate on property *in esse* at the time of giving the same, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence, and belonging to him.¹

§ 212. **Between the Parties.**—A mortgage of property to be afterwards acquired by the mortgagor, is valid as between the parties, if the property is in existence at the time of its execution, and the property is clearly embraced within the description.²

§ 213. **General Rule.**—Under the common law, the general rule is that all mortgages of property, which the mortgagor does not own at the time of the execution of the mortgage, though he acquires it afterwards, are void as to third persons. This rule has been changed in many of the States,

¹ *Borden v. Croak*, 131 Ill. 68.

² *Hirshkind v. Israel*, 18 S. Car. 157; *Beall v. White*, 94 U. S. 382; *Ludwig v. Kipp*, 20 Hun (N. Y.) 265; *Scharfenburg v. Bishop*, 35 Iowa 60; *Fejavary v. Broesch*, 52 Iowa 88; *Stephens v. Pence*, 56 Iowa 257; *Arques v. Wasson*, 51 Cal. 620; *Curtis v. Wilcox*, 49 Mich. 425; *Williams v. Winsor*, 12 R. I. 9; *Cayce v. Stovall*, 50 Miss. 396. Compare *Hunt v. Bullock*, 23 Ill. 320; *Hunter v. Bosworth*, 43 Wis. 583; *Case v. Fish*, 58 Wis. 56.

But in Illinois it is held that such property is not held by virtue of the mortgage but by virtue of an agreement, whereby an equitable lien arises favorable to the mortgagee. *Bell v. Shrieve*, 14 Ill. 462.

and it holds good only where this common-law doctrine prevails.¹

§ 214. **Verbal Agreement.**—A verbal agreement entered into by the parties to a mortgage after its execution, cannot subject after-acquired property to a lien of the mortgage as to third persons,² though such agreement might be valid as to the parties to the mortgage.³

§ 215. **Natural Increase.**—If the after-acquired property be the product of present property of the mortgagor, as the wool growing on sheep, or the produce of a dairy or farm, or anything of that character, the mortgage will take effect upon that property as soon as it comes into existence, and will be perfectly binding at law.⁴ A party may mortgage the natural and expected product, growth or increase of his own property.⁵

§ 216. **The Young of Female Animals.**—Where domestic animals are mortgaged during the period of gestation, the offspring when born will, as between the parties to the mortgage, be covered thereby, but as against *bona fide* purchasers or incumbrancers, acquiring their title without notice of the facts, and after the period of nurture has passed, such offspring will not come under the mortgage lien.⁶ So, where the owner of a domestic animal gives a mortgage on it during the period of gestation, the mortgagee will, as against the mortgagor, be entitled to the offspring when born.⁷ This

¹ *Jones v. Richardson*, 10 Met. (Mass.) 481; *Looker v. Peckwell*, 38 N. J. L. 253; *Farmers Loan and Trust Co. v. Long Beach Imp. Co.*, 27 Hun (N. Y.) 89; *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Leloverus v. Ringgold*, 3 Cranch C. C. 103; *Gardner v. McEwen*, 19 N. Y. 123; *Pierce v. Emery*, 32 N. H. 484; *Wilson v. Wilson*, 37 Md. 1; *Rose v. Bevan*, 10 Md. 466; *Otis v. Sill*, 8 Barb. (N. Y.) 102; *Hamilton v. Rogers*, 8 Md. 301.

² *Powers v. Freeman*, 2 Lans. (N. Y.) 127.

³ *Burns v. Campbell*, 71 Ala. 271.

⁴ *Conderman v. Smith*, 41 Barb. (N. Y.) 404.

⁵ *Grantham v. Hawley*, Hob. 132.

⁶ *Funk v. Paul*, 64 Wis. 35.

⁷ *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195; *Conderman v. Smith*, 41 Barb. (N. Y.) 404; *Hughes v. Graves*, 1 Litt. (Ky.) 317; *Evans v. Merriken*, 8 Gill & J. (Md.) 39; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Fowler v. Merrill*, 11 How. 375; *Kellogg v. Lovely*, 46 Mich. 181; *Darling v. Wilson*, 60 N. H. 59.

mortgage will cover and include, for a reasonable time, the produce or descendants of a female animal conveyed by the mortgage, these being incidents to a legal title, and the right of immediate possession vests in the mortgagee for whom the mortgagor holds possession.¹ But if the mortgage is not closed before it was necessary for their nurture to follow the dam, the young can then be sold by the mortgagor, unless the mortgage especially covers the increase.² Thus, when the period of nurture is past and the young being entirely separated from the mother, and not being mentioned in the mortgage, nor any longer connected with the mother covered by the mortgage, and nothing to give the third party notice, he will hold them by purchase.³

ARTICLE II.—UNPLANTED AND GROWING CROPS.

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| 217. Unplanted Crops. | 227. Rule in Wisconsin. |
| 218. Rule in Mississippi. | 228. Rule in North Carolina. |
| 219. Rule in Iowa. | 229. Rule in Minnesota. |
| 220. Rule in Nebraska. | 230. Rule in New York. |
| 221. Rule in Kansas. | 231. Rule in Illinois. |
| 222. Rule in Kentucky. | 232. Rule in Dakota. |
| 223. Rule in California. | 233. Growing Crops. |
| 224. Rule in Alabama. | 234. Pennsylvania Rule. |
| 225. Rule in Arkansas. | 235. Growing Timber. |
| 226. Rule in Tennessee. | 236. Growing Grass. |

§ 217. **Unplanted Crops.**—Whether a party can make a valid mortgage of an unplanted crop is a question upon which the authorities do not agree. Some hold that the owner of the soil may make a valid mortgage of the crops to be grown, and others hold that the grain must be planted before it can be mortgaged as a crop. Many of the States have regulated this question by statutory provisions.

¹ *Forman v. Proctor*, 9 B. Mon. (Ky.) 124.

² *Winter v. Landphere*, 42 Iowa 471.

³ *Funk v. Paul*, 64 Wis. 35. See, also, *Meyer v. Cook*, 85 Ala. 417; *Cahoon v. Miers*, 67 Md. 573.

The authorities do not agree on this subject, but the text is believed to accord with the weight of authority. The question whether a *bona fide* purchaser, after the period of nurture, can hold the offspring of the mortgaged dam, is a question on which the courts differ. See Sections 122 and 123.

§ 218. In Mississippi the owner of the soil may make a valid mortgage of the crops to be grown by him in fifteen months, before the crops are planted.¹ This is on the doctrine that one may make a present sale or mortgage of all things having a potential existence; an unplanted crop has such potential existence as to the owner or the lessee of the soil.²

§ 219. In Iowa a chattel mortgage upon crops to be raised in the future is valid, and attaches to the crop as soon as it comes into existence.³

The rule generally expressed undoubtedly is that a chattel mortgage will not be deemed to cover after-acquired property, unless the intention that it should is clearly expressed.⁴

§ 220. In Nebraska.—As a question of law, the lien of a chattel mortgage on a crop of corn not planted at the time of its execution and delivery, will not attach to the corn when it comes into existence, unless seized by the mortgagee.⁵

§ 221. In Kansas the rule accords substantially with that of Nebraska and some other States. Thus, when a chattel mortgage is given on an unplanted crop of corn, which is afterwards planted and grown, but before possession is taken thereof by the mortgagee, a creditor of the mortgagor causes an execution to be levied thereon, the execution will hold it. In this case the mortgage created no lien thereon which would defeat the levy of the execution; besides, the fact that the mortgage was filed and recorded in compliance with the statute, before the levy was made, will not charge the execution creditor or subsequent purchasers with notice. The court says: "A valid mortgage can only be given upon property which has an actual or potential existence, and corn not

¹ *McCown v. Mayer*, 65 Miss. 537.

² *Everman v. Robb*, 52 Miss. 658; *Stadeker v. Loeb*, 67 Miss. 200.

³ *Norris v. Hix*, 74 Iowa 524.

⁴ *Lormer v. Allyn*, 64 Iowa 725; *McArthur v. Garman*, 71 Iowa 34. In this State, a chattel mortgage describing certain mares said: "Also all stock I may own during the existence of this mortgage;" held, that it covered a mare afterwards acquired by the mortgagor. *Hughes v. Wheeler*, 66 Iowa 641.

⁵ *Cole v. Kerr*, 19 Nebr. 553.

planted has neither an actual nor potential life, and being without life or existence there could be no legal transfer, present or prospective, and no pretended transfer could operate upon the crop of corn after being grown, at least not until taken possession of by the mortgagee.¹

§ 222. In Kentucky a mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title, and the mortgagee has no claim against a purchaser of the crop for it or for its value.²

§ 223. In California a lessee of land in possession may execute a valid mortgage on a crop to be raised by him the coming season, but which was not yet planted, and the lien will attach.³

§ 224. In Alabama, though a mortgage on an unplanted crop creates only an equity, unless possession is taken or received after it is planted, or there is some new act effectual to pass the legal title, yet the mortgagee may maintain an action on the case against a stranger who has converted or disposed of the crop with notice of the mortgage.⁴

Such a mortgage does not convey a legal title on which the mortgagee may maintain an action of trover for the conversion of the crop, unless he has acquired possession.⁵ A mortgage given in November on cotton grown and "to be grown in the year 1887 on my land or other land in ——— county," is not valid as to lands in which the mortgagor at that time had no interest. The court said: "According to the unbroken current of our decisions, as well as by the weight of authority in other States, it is essential to the creation of such an incumbrance that the subject-matter should have a potential existence, as distinguishable from a mere

¹Long v. Hines, 40 Kans. 220. See, also, Single v. Phelps, 20 Wis. 398; Chapman v. Weimer, 4 Ohio St. 481.

²Hutchinson v. Ford, 9 Bush 318.

³Arques v. Wasson, 51 Cal. 620.

⁴Rees v. Coats, 65 Ala. 256.

⁵Whittleshoffer v. Strauss, 83 Ala. 517; Mayers v. Taylor, 69 Ala. 403; Iron Works Co. v. Renfro, 71 Ala. 577; Marks v. Robinson, 82 Ala. 69; Jackson v. Bain, 74 Ala. 328; Leslie v. Hinson, 83 Ala. 266.

possibility or expectancy on the part of the contracting parties that it will come into being. While the being itself need not have identity or separate entity, yet it must at least be a product, or growth, or increase of property which has at the time a corporeal existence, and in which the mortgagor has a present interest—not a mere belief, hope or expectation that he will in future acquire such an interest.”¹

§ 225. In **Arkansas**, where a mortgage is executed upon an unplanted crop, a lien attaches in equity as soon as the subject of the mortgage comes into existence.² This question is now regulated by statutory provisions.³

§ 226. In **Tennessee** a mortgage of unplanted crops is valid. Thus, a mortgage of a crop to be planted is valid even as against creditors of the mortgagor or other third persons.⁴

§ 227. In **Wisconsin** a different rule prevails. In this State a chattel mortgage can only operate upon property in actual existence at the time of execution, and cannot be given upon a crop before it can be said to be in existence, because there is nothing for it to operate upon, and grain sown or planted will not be a crop growing until it presents the appearance of a growing crop.⁵

§ 228. In **North Carolina** *fructus industriales* are chattels, and a conveyance of one's entire crop of corn, whether growing or unplanted, is valid, and a chattel mortgage can be made on the same, even if the crop is to be planted, and it will be valid.⁶

§ 229. In **Minnesota** a chattel mortgage on crops to be grown by the mortgagor on the land in his possession is valid.⁷

¹ *Paden v. Bellenger*, 87 Ala. 575; and see *Low v. Pew*, 108 Mass. 347; *Otis v. Sill*, 8 Barb. (N. Y.) 102; *Pennock v. Coe*, 23 How. (U. S.) 117.

² *Apperson v. Moor*, 30 Ark. 56.

³ Acts of 1875, p. 149.

⁴ *Watkins v. Wyatt*, 9 Baxt. 250.

⁵ *Comstock v. Scales*, 7 Wis. 159.

⁶ *Robinson v. Ezzell*, 72 N. Car. 231.

⁷ *Minnesota Lin. Oil Co. v. Maginnis*, 32 Minn. 193; *Miller v. McCormick*, 35 Minn. 399.

Where parties by their contract in clear terms express an intention to create a mortgage lien upon personal property not then owned but to be subsequently acquired by the mortgagor, whether then in being or not, the mortgage attaches as a lien on the property as soon as the mortgagor acquires it, as against him and all claiming under him with notice of all voluntary conveyances, the same as if the property had belonged to him when the mortgage was created, and precisely as if the property had been in being and belonged to the mortgagor when the mortgage was executed. The property must be definitely pointed out, that it may be distinguished or identified.¹

§ 230. In New York the rule is that chattel mortgages of crops to be grown may be given, because they are property having a potential existence, and the mortgagor being in possession of the land upon which they are to be grown, has a present vested right to have the crops when they come into actual existence.²

§ 231. In Illinois crops to be raised in future, not yet planted, will not pass under mortgage. To make the mortgage valid, the crops must be *in esse*.³ But a chattel mortgage on growing crops is valid.⁴

§ 232. In North and South Dakota an agreement may be made to create a lien on property not yet in existence, in which case the lien attaches when the party agreeing to give it acquires an interest in the property.⁵

Thus, a mortgage of unplanted crops is valid. Such a mortgage is valid against a *bona fide* purchaser for value, if recorded when given, and need not be again filed for record after the crops come into existence. Under the law the original contract, *ipso facto*, immediately upon the acquire-

¹ Ludlum v. Rothschilds, 41 Minn. 218.

² Farmers Loan and Trust Co. v. Long Beach Imp. Co., 27 Hun (N. Y.) 89; Van Hoozer v. Cory, 34 Barb. 9.

³ Stowell v. Bair, 5 Ill. App. 104.

⁴ Hansen v. Dennison, 7 Ill. App. 73; Stowell v. Bair, 5 Ill. App. 104.

⁵ Com. Laws, §§ 4330, 4331.

ment or creation of such property, awakens and brings into life the lien agreed upon.¹

§ 233. **Growing Crops.**—In some of the States statutory provisions are made as regards the stage of growth when crops may be mortgaged.² But generally a crop is “a growing crop,” so that it can be mortgaged, giving a legal title to the mortgagee, from the time the seed is deposited in the ground.³

§ 234. **Pennsylvania Rule.**—In this State a mortgage of a growing crop, or of any chattel, without any delivery of possession or other *indicia* of ownership, is fraudulent. The security by mortgage of personal property to a mortgagee or pawnee, depends on the right of the mortgagor or pawnor, and on the delivery of the chattel mortgaged or pledged. Delivery is necessary.⁴

§ 235. **Growing Timber.**—A mortgage of growing timber to be cut and removed from a freehold, is a mortgage of personal property. Thus, a mortgage of one and a half million feet of pine logs, part of which was in a certain lake named at the time of the execution of the mortgage, and the remainder was to be cut and placed there within a certain time, from lands which were designated, the mortgage to cover all timber cut therefrom, is a sufficient description, and a mortgage of trees to be cut is a mortgage of personal property.⁵

And a mortgage of growing timber, made by one who had

¹Grand Forks Nat. Bank v. Minneapolis and N. Elevator Co., 43 N. W. Rep. 806.

By provisions of the Dakota statute, “an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case, the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest.”

²Arkansas, Acts of 1875, p. 149; New Hampshire, Gen. Laws 1878, ch. 137, § 1; Nevada, Acts of 1885, ch. 54; Washington, Code, § 1986; Cook v. Steel, 42 Tex. 53; must be harvested in New Mexico before mortgaged, Com. Laws, § 1586.

³Wilkinson v. Ketler, 69 Ala. 435; Hanson v. Dennison, 7 Ill. App. 73; Cotton v. Willoughby, 83 N. Car. 75.

⁴Clow v. Woods, 5 S. & R. 275. See, also, Lynch v. Welch, 3 Pa. St. 294.

⁵Boykin v. Rosenfield, 69 Tex. 115.

purchased the same to be cut and removed, is a mortgage of personal property, which will be effectual as soon as the timber shall be severed from the land, and should be recorded as a chattel mortgage.¹

§ 236. **Growing Grass.**—Growing grass, fruit and trees are natural products of the earth, and are parcels of the land. They are within the statute of frauds, and can only be sold by an agreement in writing.² But grain and vegetables, which are annual products of the earth, are chattels, and may be seized on execution as chattels, and may be mortgaged or conveyed by parol.³ Where the mortgagor of grass owns both the land and the grass or trees, and he fails to fulfill the condition of the mortgage, then there is a severance in contemplation of law, and the grass becomes a chattel belonging to the mortgagee.⁴ When the grass is owned by one not the owner of the freehold, then it is not considered a parcel of the land.⁵

ARTICLE III.—PERFECTING LIEN BY TAKING POSSESSION.

237. Taking Possession of After-acquired Property.

238. After-acquired Stock of Goods.

239. What is Covered.

240. Mortgagor Becoming Agent for Mortgagee.

241. Statutory Provisions.

242. To Cover New Goods.

243. Rule of Other Courts.

§ 237. **Taking Possession of After-Acquired Property by Mortgagee.**—If after the acquiring such property by the

¹ *Claffin v. Carpenter*, 4 Met. (Mass.) 580; *Sheldon v. Conner*, 48 Me. 584; *Wood v. Lester*, 29 Barb. (N. Y.) 145; *Cook v. Stearns*, 11 Mass. 533; *Douglas v. Shumway*, 13 Gray (Mass.) 498; *Cudworth v. Scott*, 41 N. H. 456; *Erskine v. Plummer*, 7 Me. 447; *Nelson v. Nelson*, 6 Gray (Mass.) 385.

² *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Wintermute v. Light*, 46 Barb. (N. Y.) 278; *Rodwell v. Phillips*, 9 M. & W. 501; *Carrington v. Roots*, 2 M. & W. 248; *Crosby v. Wadsworth*, 6 East 602.

³ *Robinson v. Ezzell*, 72 N. Car. 231; *Jones v. Flint*, 10 Ad. & E. 753; *Parker v. Staniland*, 11 East 362.

⁴ *Bank v. Crary*, 1 Barb. (N. Y.) 542.

⁵ *Smith v. Jenks*, 1 Denio (N. Y.) 580; 1 N. Y. 90; *Green v. Armstrong*, 1 Denio (N. Y.) 550.

mortgagor, and before any other rights intervene, the mortgagee takes possession of the property specified in the mortgage, his right is superior to all other persons.¹ A stipulation in a chattel mortgage that the after-acquired property shall be subject to the same lien, and that the mortgagor will execute a new mortgage thereof, is an executory agreement, which does not cover after-acquired property until executed; nor does it avoid the mortgage as to property to which it attached at the time of its execution.²

In Maine, the growing of the yearly crop of hay on a farm to pay the purchase-money notes for an indefinite period will not give the grantee a right to replevy the fifth crop, sold by the grantor who was in possession, to a *bona fide* purchaser.³ Possession of after-acquired property rightfully taken and maintained by the mortgagee, under a mortgage purporting to cover it, gives him a title good not only against the mortgagor, but even against an assignee in insolvency and attaching creditor.⁴ Thus, where a chattel mortgage covered a stock in trade of furniture and fixtures in the mortgagor's store, provides that "all goods, stock in trade, furniture and fixtures hereafter purchased by the mortgagor shall be included in and covered by the mortgage," the mortgage covers all after-acquired property of the classes mentioned, and upon foreclosure such property may be taken and sold by the mortgagee the same as the property in possession of the mortgagor at the time the mortgage was executed.⁵

In general, a mortgage of chattels to be afterwards acquired by the mortgagor and used for a definite purpose at a definite place, or definitely described, gives the mortgagee an equitable lien upon such property when acquired, as against the

¹ *Cook v. Corthell*, 11 R. I. 482; *Gregg v. Sanford*, 24 Ill. 17; *Chapin v. Cram*, 40 Me. 561; *Williams v. Briggs*, 11 R. I. 476; *Walker v. Vaughn*, 33 Conn. 577.

² *Codman v. Freeman*, 3 Cush. (Mass.) 306. See, also, *Griffith v. Douglass*, 73 Me. 532.

³ *Shaw v. Gilmore*, 81 Me. 396.

⁴ *Blanchard v. Cooke*, 144 Mass. 207.

⁵ *Bennett v. Bailey*, 150 Mass. 257.

mortgagor, and as against his creditors and subsequent purchasers, when taken possession of by the mortgagee before rights of those third parties intervene.¹ Thus, when a chattel mortgage given to secure the payment of rent includes after-acquired property to be placed in the leasehold buildings, such mortgage is good in equity, and the property becomes subject to the equitable lien as soon as it is so placed in the building. Such equitable lien is valid as against the mortgagor, and also as against a subsequent mortgagee with notice, in those States where actual notice is equivalent to registration.²

§ 238. **After-Acquired Stock of Goods.**—The decisions of the courts are conflicting as to whether goods to be purchased to replenish a stock can be mortgaged. It is held by some courts that a clause in a chattel mortgage upon a stock of goods, which purports to extend the lien of the mortgage over after-acquired property, does not render the mortgage absolutely void, when there is an arrangement permitting the mortgagor to deal with the goods mortgaged; to make it void, an intent to defraud creditors must be affirmatively found.³

§ 239. **What Is Covered.**—A mortgage of a stock of goods, containing a clause that goods which might be thereafter purchased by the mortgagor, should be held for the payment of the debt, will not transfer to the mortgagee goods afterwards purchased and put in with the stock of the mortgagor.⁴

A chattel mortgage on goods, wares and merchandise then in stock, in a certain storeroom, and to be had to replenish such stock, covers barrels of salt for sale, as a part of the stock, in a shed used in connection with the store, and also

¹ *Wright v. Bircher*, 72 Mo. 179; *Frank v. Playter*, 73 Mo. 672; *Rutherford v. Stewart*, 79 Mo. 216.

² *Keating v. Hannenkamp*, 100 Mo. 161.

³ *Yates v. Olmsted*, 56 N. Y. 632; *Brett v. Carter*, 2 Low. D. C. 458; *Zaring v. Cox*, 78 Ky. 527; *Moore v. Young*, 4 Biss. C. C. 128.

⁴ *Chapin v. Cram*, 40 Me. 561; *In re Bloom*, 17 Bank. Reg. 425; *In re Manly*, 2 Bond D. C. 261; *Chatham Nat. Bank v. O'Brien*, 6 Hun (N. Y.) 231; *Case v. Fish*, 58 Wis. 56.

barrels of oil which had been temporarily removed from the store.¹

A chattel mortgage of a stock of goods and "all book accounts and all rights or credits arising from such business," does not cover subsequently-accruing accounts of sales, with the mortgagee's consent, in regular course of trade.²

§ 240. **Mortgagor Becoming Agent for the Mortgagee.**—Where a mortgagor of goods retains possession as selling agent for the mortgagee, who fails to record the mortgage, and new goods are added to the stock from time to time, which are not embraced in the mortgage, the rights of attaching creditors of the mortgagor are, in Colorado, paramount to those of the mortgagee.³

§ 241. **Statutory Provisions.**—By the Revised Code of Georgia⁴ a mortgage may be made to cover a stock of merchandise as it changes by sales and purchase, but to be enforced to the extent of the value of the stock on hand at the time when it was given, at least as against any person having a prior claim in respect to goods subsequently purchased.⁵

§ 242. **To Cover New Goods.**—A mortgage given which specifies that it shall cover new goods to be bought to fill the place of those sold, to be paid for out of the proceeds of sale, is ineffectual to give the mortgage any validity as to goods acquired, according to the authority of many courts.⁶

¹ *Stephens v. Pence*, 56 Iowa 257.

² *Lormer v. Allyn*, 64 Iowa 725. See, also, *Lashbrooks v. Hatheway*, 52 Mich. 124; *Kemp v. Carnley*, 3 Duer (N. Y.) 1.

³ *Wilcox v. Jackson*, 7 Colo. 521.

⁴ Section 1954.

⁵ *Goodrich v. Williams*, 50 Ga. 425; *Chisolm v. Crittenden*, 45 Ga. 213.

⁶ *St. Louis Drug Co. v. Dart*, 7 Mo. App. 590; *Hamilton v. Rogers*, 8 Md. 301; *Sharpe v. Pearce*, 74 N. Car. 600; *Williams v. Briggs*, 11 R. I. 476; *Rose v. Bevan*, 10 Md. 466; *Moody v. Wright*, 13 Met. (Mass.) 17; *Rhines v. Phelps*, 3 Gilm. (Ill.) 455; *Sparks v. Mack*, 31 Ark. 666; *Brasher v. Christophe*, 10 Colo. 284; *Wilson v. Voight*, 9 Colo. 614; *Schemerhorn v. Mitchell*, 15 Ill. App. 418; *Greenbaum v. Wheeler*, 90 Ill. 296; *Ross v. Wilson*, 7 Bush (Ky.) 29; *Zaring v. Cox*, 78 Ky. 527; *Horton v. Williams*, 21 Minn. 187; *Stein v. Munch*, 24 Minn. 390; *Joseph v. Levi*, 58 Miss. 843; *Harman v. Hoskins*, 56 Miss. 142; *France v. Thomas*, 86 Mo. 80; *Leopold v. Silverman*, 7 Mont. 266; *Doak v. Brubaker*, 1 Nev. 218; *Wilson v. Hill*, 17 Nev. 401; *Jacobs v. Ervin*, 9 Oreg. 52; *McKibbin v. Martin*, 64 Pa. St. 352; *Nat. Bank v. Ebbert*, 9 Heisk. (Tenn.) 153; *Nat. Bank v. Lovenberg*, 63 Tex. 506; *Lang*

§ 243. **Rule of Other Courts.**—Other courts hold that a mortgage of a stock of merchandise, authorizing the mortgagor to continue and sell the goods, which expressly stipulates that such sale shall be exclusively for the benefit of the mortgagee, and that new goods may be bought to replenish the stock, is valid as against the mortgagor's creditors, in the absence of evidence of actual fraud.¹

ARTICLE IV.—POTENTIAL INTERESTS.

244. Potential Interests May be Mortgaged.

245. Potentiality as Applied to Unplanted Crops.

246. A Contrary Doctrine.

247. Lord Hobart's Doctrine.

§ 244. **Potential Interests May Be Mortgaged.**—The authority to sustain this rule is the statement of Lord Hobart: "Land is the mother and root of all fruit. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe-wool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that he shall grow upon his sheep that he shall buy hereafter, for then he hath it neither actually nor potentially." He may, therefore, sell or mortgage the natural and expected products, growth or increase of his own property; but he cannot sell or mortgage the crops to grow upon the land of another, or the wool to grow upon another's sheep, or upon sheep that he may buy thereafter.²

v. Lee, 3 Rand. (Va.) 410; *Sheppards v. Turpin*, 3 Gratt. (Va.) 373; *Garden v. Bodwing*, 9 W. Va. 121; *Anderson v. Patterson*, 64 Wis. 557; *Robinson v. Elliott*, 22 Wall. (U. S.) 513.

¹ *Murray v. McNealy*, 86 Ala. 234; *Reichert v. Simons* (Dak.), 42 N. W. Rep. 657; *Rev. Stat. of Indiana*, 1881, § 4924; *Meyers v. Evans*, 66 Iowa 179; *Howard v. Rohlfig*, 36 Kans. 357; *Deering v. Cobb*, 74 Me. 332; *Wingler v. Sibley*, 35 Mich. 231; *Hubbell v. Allen*, 90 Mo. 574; *Davis v. Scott*, 22 Nebr. 154; *Parker v. Jacobs*, 14 S. Car. 112; *Peabody v. Landon*, 61 Vt. 318; *Langer v. Brown*, 3 Wash. St. 102.

For a full discussion of this subject, see Chapter XIII.

² *Grantham v. Hawley*, 1 Hobart 132.

The doctrine of another holds that the following may be transferred: "Leases for years, be they present or future, wardships of tenants *in capite*, or by knight's service, trees, oxen, horses, plate, household stuff and the like; also trees, grass and corn growing and standing upon ground, fruit upon the trees, wool upon the sheep's back, is grantable."¹ It is noticeable that potential interests are not named by the last authority, so far as unplanted crops are concerned.

§ 245. **Potentiality as Applied to Unplanted Crops.**—It is held by many courts, no statutory provision intervening, that a crop to be planted on one's own land or on land leased by him, may be mortgaged under the doctrine of potentiality.² Thus, a lessee of land has a sufficient potential interest in the land to mortgage his crops to be grown during the whole term of the lease.³

A chattel mortgage of crops to be raised in the future is valid, and attaches to the property as soon as it comes into existence. And a chattel mortgage providing that the after-acquired property shall be transferred thereby, is valid, and such property, upon its acquisition, becomes subject thereto. The principle upon which this doctrine is upheld is not wholly unlike the conveyance of land by deed of warranty, in which the grantor has no title. If he afterwards acquires the title, the land will pass under the prior deed. So as to unplanted crops. While there is nothing upon which a mortgage can operate at the time of its execution, it does attach to the property when it comes into existence.⁴

§ 246. **A Contrary Doctrine.**—While the weight of au-

¹ 1 Shep. Touch. 241.

² Rawlins v. Hunt, 90 N. Car. 270; Robinson v. Ezzell, 72 N. Car. 231; Watkins v. Wyatt, 9 Baxt. (Tenn.) 250; Senter v. Mitchell, 16 Fed. Rep. 206; Thrash v. Bennett, 57 Ala. 156; Hurst v. Bell, 72 Ala. 336; Van Hoozer v. Cory, 34 Barb. (N. Y.) 9; Arques v. Wasson, 51 Cal. 620; Conderman v. Smith, 41 Barb. (N. Y.) 404.

³ Smith v. Atkins, 18 Vt. 461; Everman v. Robb, 52 Miss. 653; Booker v. Jones, 55 Ala. 266; Thrash v. Bennett, 57 Ala. 156; Robinson v. Kruse, 29 Ark. 575; Headrick v. Brattain, 63 Ind. 438; Petch v. Tutin, 15 Mees. & W. 110.

⁴ Scharfenburg v. Bishop, 35 Iowa 60; Brown v. Allen, 35 Iowa 306; Stephens v. Pence, 56 Iowa 257.

thority sustains the rule that unplanted crops may be mortgaged when the mortgagor is the owner or lessee of the land on which the crops are to be planted, yet there is much authority to the contrary, and still other authority that such mortgage is valid in equity when third parties have notice. The Nebraska Supreme Court says: "There is, to say the least of it, great confusion of the authorities on this point being considered; but after careful examination of those cited by the other side, in this case, I have reached the conclusion that, as a question of law, a lien of the chattel mortgage of crops of corn not yet planted at the time of its execution, a delivery will not attach to the corn when it comes into existence, until it is seized by the mortgagee, or until, in the language of a member of the court, in the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, 'a new intervening act.' Until then it remains a mere license only to go upon, and conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor. Presumptuous as it may seem to say so, I cannot agree to the proposition stated by Lord Hobart in the case cited by counsel for the defendant in error, that the owner of land, though he had not the future crop 'actually in him nor certain, yet he had it potentially;' while it is true, as he adds, that 'the land is the mother and root of all fruit.' The word 'potentially,' as defined by Craig, means 'in possibility, not in act, not positively, in efficacy, not in actuality.' With this definition in view, it cannot be said that the mere ownership or possession of the soil carries with it the production of crops potentially. Soil, alone, does not produce crops of corn in this degenerate age, if it ever did. It now requires, in addition to soil, seed, and labor both of man and beast; so that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach and come into efficacy without 'a new intervening act,' carries with it the proposition that a man may mortgage his labor to be performed—something which is never heard contended for in this country, but

which is a right which, under the name of 'peonage,' is recognized in our sister republic to the south of us."¹

A mortgage of a crop to be raised on a farm during a certain term, and which is not yet sown, passes no title to the mortgagee, as against a purchaser of the crop when grown, for its value.² So, a chattel mortgage, given upon a crop of grain at or about the time it is sown, and before it is up and has the appearance of a growing crop, is wholly inoperative upon the crop when grown.³

§ 247. **Lord Hobart's Doctrine of Potential Interest.**—The doctrine of Lord Hobart, so far as the mortgaging of unplanted crops is concerned, does not find support in all of the English cases. Thus, when a party transfers by deed all his household goods, farming stock, crops and personal estate on his farm, as a security, crops to be planted do not pass unless taken possession of, after being planted, by the mortgagor.⁴ So, under a bill of sale, growing crops passed on the execution of the deed, but future crops did not; that the mortgagee would have no legal or equitable title to crops not sown at the execution of the instrument.⁵ But this principle of potential interest was recognized: A tenant for years of a farm, being indebted to his landlord, assigned to him by deed "all his household goods and all his tenant right and interest, yet to come and unexpired, in and to the farm and premises. Under this agreement it was held that the tenant's interest in crops grown in future years of the term passed to the landlord."⁶

¹ *Cole v. Kerr*, 19 Nebr. 553.

² *Hutchinson v. Ford*, 9 Bush (Ky.) 318.

³ *Comstock v. Scales*, 7 Wis. 159; *Lamson v. Moffat*, 61 Wis. 153; *Funk v. Paul*, 64 Wis. 35. See *Redd v. Burrus*, 58 Ga. 574; *Bank of Lansingburg v. Crary*, 1 Barb. (N. Y.) 542; *Milliman v. Neher*, 20 Barb. (N. Y.) 37; *Stowell v. Bair*, 5 Ill. App. 104; *Cressey v. Sabre*, 17 Hun (N. Y.) 120; *Cudworth v. Scott*, 41 N. H. 456; *Gittings v. Nelson*, 86 Ill. 591; *Tomlinson v. Greenfield*, 31 Ark. 557.

⁴ *Hope v. Hayley*, 5 El. & Bl. 830.

⁵ *Congreve v. Evetts*, 10 Ex. 298. See, also, *Gale v. Burmell*, 7 Q. B. 850.

⁶ *Petch v. Tutin*, 15 Mees. & W. 110.

ARTICLE V.—IN EQUITY.

- 248. Equitable Rule.
- 249. Property Not Specifically Described.
- 250. Between the Parties to the Mortgage.
- 251. Lessor's Right to Seize Crops Afterwards Grown.
- 252. Notice.
- 253. Garnishee with Notice.
- 254. Taking Possession.
- 255. *Novus Actus Interveniens*.
- 256. In England—The Prevailing Doctrine in Equity.
- 257. Weight of Authority.

§ 248. **In Equity.**—Some courts hold that no legal title passes to after-acquired property, but that, in equity, a different rule prevails. That such a mortgage creates in the mortgagee an equitable interest in the property, which will prevail even against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of this doctrine is that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the maxim that equity considers that as done which ought to be done.¹ Accordingly, when a chattel mortgage, given to secure the payment of rent, includes after-acquired property to be placed in the leasehold buildings, such mortgage is good in equity, and the property becomes subject to the equitable lien as soon as it is so placed in the building.²

§ 249. **Equitable Lien on After-Acquired Property Not Specifically Described.**—The intention of the parties, that a chattel mortgage shall take effect and include property not then owned by the mortgagor but to be subsequently acquired, must be expressed by the instrument itself, in words

¹ *Borden v. Croak*, 131 Ill. 68.

² *Keating v. Hannenkamp*, 100 Mo. 161.

sufficient to carry the intention into effect, and cannot be shown by extrinsic evidence.¹

A contract for the sale or mortgaging of subsequently-acquired chattels will not be enforced in equity where no chattels are specifically described. It will not, where the only description is that contained in the general word "property." The equitable title to goods as well as to land is confined to specific property, and does not extend to goods which are undetermined.²

The intention to mortgage after-acquired goods must be made clear, and the goods claimed under the mortgage must be clearly within the descriptive words.³

§ 250. **Between the Immediate Parties.**—As between the immediate parties to the mortgage, a specific description of the several articles mortgaged, to identify them from other like articles of the mortgagor, is unnecessary.⁴

§ 251. **Lessor's Right to Seize Crops Afterwards Grown.**—A lease of a farm contained a clause giving the lessor "a lien for the payment of the rent aforesaid on all goods, stocks, fixtures, tools and other personal property which may be put on said premises, and said lien to be enforced on the non-payment of the rent," by taking and sale, as in case of a chattel mortgage. The lessor seized some of the crops and sold them, after default in payment of rent. It was held that the clause was, in substance, a chattel mortgage, which, as against the lessee, so far as it purported to create a lien upon the property not in existence or not then acquired, in law might not pass title, yet it gave the lessor a license to seize such property, and after such seizure, the title passed; that, in equity, it transferred the beneficial interest without the intervention of any new act which attached immediately upon coming into existence, or the acquisition of

¹ *Montgomery v. Chase*, 30 Minn. 132.

² *Borden v. Croak*, 131 Ill. 68.

³ *Curtis v. Wilcox*, 49 Mich. 425.

⁴ *Leighton v. Stuart*, 19 Nebr. 546; *Call v. Gray*, 37 N. H. 428; *Fletcher v. Morey*, 2 Story D. C. 555; *Mitchell v. Winslow*, 2 Story D. C. 630; *Webster v. Nichols*, 104 Ill. 178.

the property, and the clause covered crops subsequently raised upon the farm.¹

§ 252. **Notice.**—When mortgages of after-acquired chattels are recognized as valid, notice must be given to *bona fide* purchasers, in order to protect the interest of the mortgagee. Thus, a farm was mortgaged to secure the purchase-money, and it was provided that the mortgagor might cut the growing timber into wood, and the mortgagee should have a lien upon it, and upon demand have delivered to him a mortgage or mortgages necessary to perfect the lien. This agreement was not construed as a mortgage, but a valid agreement for a mortgage, which was a lien on the wood so fast as severed from the land, and valid against all persons claiming any lien or interest through the mortgagor with notice.²

A tenant verbally agreed to work the land of another upon shares, and agreed that the crop unplanted should be security for any provisions advanced by the landlord. This agreement constituted the parties tenants in common, and the tenant could make a chattel mortgage of the crop, which, being duly registered as required, would prevail over the secret verbal agreement in favor of the landlord.³

§ 253. **Rights of Garnishee With Notice.**—In Michigan, under a chattel mortgage of all the mortgagor's stock in trade "now and hereafter" to be owned by him, authorizing the mortgagee, in case of default, to take possession thereof, and to collect and receive moneys on the accounts, the mortgagee, not having waived his right of lien, can hold as against a garnishee creditor having full notice thereof, money due the mortgagor from the garnishee on account of sales of stock

¹ McCaffrey v. Woodin, 65 N. Y. 459. See, also, Van Hoozer v. Cory, 34 Barb. (N. Y.) 9; Conderman v. Smith, 41 Barb. (N. Y.) 404; Wood v. Lead-bitter, 13 Mees. & W. 838; Wood v. Manly, 11 Adol. & E. 34.

² Wood v. Lester, 29 Barb. (N. Y.) 145.

³ Jones v. Chamberlin, 5 Heisk. (Tenn.) 210; Stamps v. Gilman, 43 Miss. 456; Tedford v. Wilson, 3 Head (Tenn.) 311; Polk v. Foster, 7 Baxt. (Tenn.) 98; Gregg v. Sanford, 24 Ill. 17; Hart v. Farmers and Mer. Bank, 33 Vt. 252; Butler v. Hill, 1 Baxt. (Tenn.) 375; Duke v. Strickland, 43 Ind. 494. See Robson v. Michigan Cent. R. R. Co., 37 Mich. 70; Cadwell v. Pray, 41 Mich. 307; McGee v. Fitzer, 37 Tex. 27.

in trade, part of such stock having been acquired, and the sales having been made after the execution of the mortgage. The terms of this mortgage covered the notes, accounts, drafts, bills of exchange due or to become due, and authorized the mortgagee to collect and receive moneys thereon. The debt garnisheed was a book account arising from the purchase of supplies by a railroad company. The mortgagee had, by the terms of the mortgage, a right to demand the money on such accounts and collect them. The mortgagor had the right to sell in the ordinary course of trade, and, so far as one kind of the property was concerned, it was expected that he would sell on credit, and the mortgagee should collect such accounts. Under this condition and the terms of the mortgage, the mortgagee's right was superior to a garnishee creditor's under a garnishee process.¹

§ 254. **Perfecting Lien By Taking Possession.**—In many States a mortgage of after-acquired property is ineffectual to transfer the legal title of this property, unless possession is given to the mortgagee, or taken by him under the mortgage.²

The reason of this is expressed in the maxim, *Nemo dat quod non habet*—"No person can grant what he has not." This doctrine is, strictly speaking, applicable only at law. In equity such a mortgage is effectual to charge the property, when acquired, with an equitable lien, or to create an equitable title to it in favor of the mortgagee against the mortgagor, and even, as in many cases courts maintain, against

¹ Fuller v. Mich. Cent. R. R. Co., 78 Mich. 36.

² Jones v. Richardson, 10 Met. (Mass.) 481; Moody v. Wright, 13 Met. (Mass.) 17; Barnard v. Eaton, 2 Cush. (Mass.) 294; Codman v. Freeman, 3 Cush. (Mass.) 306; Chesley v. Josselyn, 7 Gray (Mass.) 489; Henshaw v. Bank, 10 Gray (Mass.) 568; Rowley v. Rice, 11 Met. (Mass.) 333; Butterfield v. Baker, 5 Pick. (Mass.) 522; Williams v. Briggs, 11 R. I. 476; Cook v. Corthell, 11 R. I. 482; Otis v. Sill, 8 Barb. (N. Y.) 102; Milliman v. Neher, 20 Barb. (N. Y.) 37; Hunt v. Bullock, 23 Ill. 325; Hamilton v. Rogers, 8 Md. 301; Chynoweth v. Tenney, 10 Wis. 397; Farmers Loan and Trust Co. v. Commercial Bank, 11 Wis. 207; Single v. Phelps, 20 Wis. 398; Gale v. Bosnell, 7 Q. B. 850; Lunn v. Thornton, 1 C. B. 379; Robinson v. McDonnell, 5 M. & S. 228; Congreve v. Evetts, 10 Ex. 298; McCaffrey v. Woodin, 65 N. Y. 459; Titus v. Mabee, 25 Ill. 257; Gregg v. Sanford, 24 Ill. 17; Roy v. Goings, 6 Ill. App. 162; Brown v. Webb, 20 Ohio 389; Chapman v. Weimer, 4 Ohio St. 481; Oliver v. Town, 28 Wis. 328; Morrow v. Reed, 30 Wis. 81; Moore v. Byrum, 10 S. Car. 452; Scharfenburg v. Bishop, 35 Iowa 60.

third persons, and especially so when they have actual knowledge of the mortgage.¹

§ 255. **Novus Actus Interveniens.**—Many decisions hold that, though the mortgage, *per se*, is inoperative to transfer the legal title, possession so given or taken under it transfers the legal title to the mortgagee, being the *novus actus interveniens*² as stated by Lord Bacon, to give effect to the mortgage as a *declaratio præcedens*.³

§ 256. **In England—The Prevailing Doctrine in Equity.**—The established doctrine in equity was clearly set forth in the English case of *Holroyd v. Marshall*.⁴ In this case, Taylor owned certain machinery in a mill. It was purchased by Holroyd, but not removed, the vendor continuing in possession. He executed a deed which declared that the machinery was the property of Holroyd; that Taylor desired to purchase the machinery for a definite sum, but had not the money to pay for it, wherefore it was conveyed to a party in trust, when Taylor should pay the money to transfer to him, and if he did not pay to hold the property for Holroyd. It was covenanted that all the machinery placed in the mill, in addition to or in substitution for the original machinery, should be subject to the same trusts.

¹ *Holroyd v. Marshall*, 10 H. L. 191; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Mitchell v. Winslow*, 2 Story C. C. 630; *Sillers v. Lester*, 48 Miss. 513; *Pennock v. Coe*, 23 How. (U. S.) 117; *Galveston R. R. Co. v. Cordway*, 11 Wall. (U. S.) 459; *United States v. New Orleans R. R. Co.*, 12 Wall. (U. S.) 362; *Butt v. Ellett*, 19 Wall. (U. S.) 544; *Tedford v. Wilson*, 3 Head (Tenn.) 311; *Seymour v. Canandaigua R. R. Co.*, 25 Barb. 284; *Beall v. White*, 94 U. S. 382; *Britt v. Carter*, 2 Low. D. C. 458; *Apperson v. Moore*, 30 Ark. 56; *Robinson v. Maudlin*, 11 Ala. 977; *Floyd v. Morrow*, 26 Ala. 353; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Ellett v. Butt*, 1 Woods C. C. 214.

² *Licet dispositio de interesse futuro sit inutiles, tamen potest fieri declaratio præcedens quæ sortiatur effectum, interveniente novo actu.*

³ Though the grant of a future interest may be invalid, yet a declaration precedent may be made which will take effect on the intervention of some new act."

⁴ *Hope v. Haley*, 5 El. & B. 830; 34 Eng. Law & Eq. 189; *Langton v. Horton*, 1 Hare 549; *Congreve v. Evetts*, 10 Ex. 298; 26 Eng. Law & Eq. 493; *Baker v. Gray*, 17 C. B. 462; *Chapin v. Cram*, 40 Me. 561; *Titus v. Mabee*, 25 Ill. 257; *Carrington v. Smith*, 8 Pick. (Mass.) 419; *Rowley v. Rice*, 11 Met. (Mass.) 333; *Rowan v. Sharp's Rifle Man. Co.*, 29 Conn. 282; *Bryan v. Smith*, 22 Ala. 534; *Farmers Loan and Trust Co. v. Commercial Bank*, 11 Wis. 207.

⁵ 10 H. L. Cas. 191.

Taylor sold some of the original machinery, bought some in addition, but nothing was done by or on behalf of Holroyd to take possession of the newly-purchased machinery. Then Holroyd served Taylor with notice of demand for payment of the sum specified. After that an execution was levied on the machinery by a creditor. Lord Westbury decided, though the contract as to the future-acquired property passed no title, yet that if a vendor or mortgagor agreed to sell or mortgage property of which he is not possessed at the time, and receives a consideration, and afterwards becomes possessed of the property answering the description of the contract, that will, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately out of the property being acquired; that there was a trust imposed on the fund by the force of the contract, and that the incapacity to perform it at the time of its execution, is no answer where the means of doing so are afterwards obtained. So, as soon as the new machinery and effects were placed in the mill, they became subject, in equity, to the operation of the contract, and passed to the mortgagee, to whom Taylor was bound to make a legal conveyance, and for whom he was, in the meantime, a trustee of the property in question.

In the same case, Lord Chelmsford distinguished the rule at law and equity. He says that in equity the estate attaches as soon as the property is acquired by the debtor. At law, property not existing, but to be acquired at a future time, is not assignable; in equity, it is transferable. At law, though a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken. In equity it is not disputed that the moment the property comes into possession the deed operates upon it. The court further reviewed those cases which had been supposed to conflict with this decision. It is declared that *Langton v. Horton*¹ does not impugn the general principle.

¹ 1 Hare 549.

The *dicta* in *Mogg v. Baker*,¹ to the effect that no equitable title passes without "the new intervening act," are disproved. It agrees with the case of *Smithurst v. Edmunds*,² and other American cases.

§ 257. **Weight of Authority.**—The weight of authority is that, at law, a mortgage upon property not yet acquired is invalid until an intervening act, such as taking possession of the property when acquired, by the creditor or mortgagee. Or in case of a license, if possession be taken of the property by the creditor, there is as much reason to connect the new intervening act with the authority, as though the instrument were, in form, a mortgage. No special form of words is necessary to constitute a mortgage. But little attention is to be paid to the form of the contract, the great purpose of the courts being, as far as possible, to carry out the true and deliberate meaning of the parties, as far as it can be done consistently with the rules of law.

The rule in equity is much less technical and more comprehensive than at law. In law there must be a new intervening act; a mere license is not sufficient unless acted upon. In equity the estate attaches as soon as the property is acquired by the debtor. At law, property not existing, but to be acquired at a future time, is not assignable; in

¹ 3 M. & W. 195.

² 14 N. J. Eq. 408; *McCaffrey v. Woodin*, 65 N. Y. 459; *Mitchell v. Winslow*, 2 Story C. C. 639; *Rowan v. Sharp's Rifle Man. Co.*, 29 Conn. 282; *Walker v. Vaughn*, 33 Conn. 577; *Gevers v. Wright*, 18 N. J. Eq. 330; *Williamson v. New Jersey S. R. R. Co.*, 29 N. J. Eq. 311. Judge Story said, in *Mitchell v. Winslow*, 2 Story C. C. 630: "It seems to me a clear result of all the authorities that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntary or with notice, or in bankruptcy."

In *Beall v. White*, 94 U. S. 382, Justice Clifford said that in certain cases courts of equity will permit the conveyance to take effect upon the property when it is brought into existence and belongs to the vendor, in fulfillment of an expressed agreement, if founded upon a valuable consideration, and it appears no rule of law is infringed, and the rights of third persons not prejudiced. But he said: "Were it necessary to reconcile the decisions upon this subject, the effort would be involved in difficulty."

equity it is transferable. At law, though a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken. In equity, the moment the property comes into possession the deed operates upon it. In fine, a mortgage of future-acquired property will bind both real and personal estate, when acquired, as to third parties themselves, and all parties claiming under them with notice.¹

In many States, and in the United States courts, the doctrine of *Holroyd v. Marshall*² has been gradually prevailing in equity. In equity the later decisions, and of courts whose opinions are entitled to most weight, have held the taking of possession unnecessary as against an attaching creditor. The equitable lien attaches as soon as the assignor or contractor acquires a title thereto, against him and all persons asserting a claim thereto under him, either voluntary or with notice or in bankruptcy.³

The ground of this principle is, that the mortgage or conveyance, though inoperative as a conveyance, is operative as an executory contract, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done.⁴

¹ *McCaffrey v. Woodin*, 65 N. Y. 459.

² 10 H. L. Cas. 191.

³ *Cook v. Corthell*, 11 R. I. 482.

⁴ *Williams v. Briggs*, 11 R. I. 476.

It was held by the House of Lords that as between the equitable charge and a judgment creditor neither possession nor notice was essential. *Holroyd v. Marshall*, 10 H. L. Cas. 191.

To be upheld in equity, the description of the property mortgaged must be certain; the contract should refer to some particular property reasonably certain to come into existence, so that the minds of the parties may be in accord as to what it is to be. *Morrill v. Noyes*, 56 Me. 458.

CHAPTER VII.

POSSESSION.

ARTICLE I.—CHANGE OF POSSESSION.

258. Right of Possession—Mortgagee Must Take Possession.

259. Mortgagor Holding Possession as the Mortgagee's Agent.

§ 258. **Right of Possession—Mortgagee Must Take Possession.**—Where there are no stipulations to the contrary in the instrument, the mortgagee is entitled to the possession of the mortgaged property from the execution of the mortgage.¹

If the chattels are in the possession or under the control of the mortgagor, there must be an immediate and continued change of possession, otherwise the transaction will be presumed to be fraudulent as against the mortgagor's creditors or subsequent purchasers.² Thus, machinery in a woolen factory is personalty. If it is mortgaged and left in possession of the mortgagor, it is subject to attachment for his debts.³

The change of possession contemplated is an open, visible, substantial change, and must be such as to give notice to the public that there has been a change in the ownership.⁴

§ 259. **Mortgagor Holding Possession as the Mortgagee's Agent—Construction.**—The mortgagor will not be permitted to hold possession of the property as the mortgagee's agent,

¹ *Mattison v. Baucus*, 1 N. Y. 295; *Hill v. Beebe*, 3 Kern. (N. Y.) 565; *Pickard v. Low*, 15 Me. 48; *Brackett v. Bullard*, 12 Met. (Mass.) 808; *Ferguson v. Thomas*, 26 Me. 499; *Morrow v. Reed*, 30 Wis. 81; *Manson v. Ins. Co.*, 64 Wis. 26; *Leach v. Kimball*, 34 N. H. 568; *Brown v. Campbell* (Kans.), 24 Pac. Rep. 492.

² *Bissell v. Hopkins*, 3 Cow. (N. Y.) 166; *Smith v. Acker*, 23 Wend. (N. Y.) 653 and note; *Thompson v. Blanchard*, 4 N. Y. 303; *Russell v. Fillmore*, 15 Vt. 130.

³ *Sturgis v. Warren*, 11 Vt. 433.

⁴ *Judd v. Langdon*, 5 Vt. 234; *Morris v. Hyde*, 8 Vt. 352; *Butler v. Stoddard*, 7 Paige (N. Y.) 163.

where there is no actual or constructive change of possession. Thus, a manufacturing company gave to a creditor a paper acknowledging that the company had pledged to him certain chattels in its manufactory. The president of the company was appointed to hold possession for the pledgee, the chattels remaining in the factory, and the president to exercise the same control over them after pledging as before. These chattels were mortgaged to another party, to secure a debt and loan, the superintendent of the company informing the mortgagee that there were no liens on the property, and the mortgagee had no knowledge that there were any liens. It was held that the mortgagee could hold as against the pledgee.¹

The vendee of a chattel agreed that it should remain with the vendor until payment was made. The vendee mortgaged to the vendor another chattel as collateral security. A third party, who had possession of the chattel mortgage, paid what was due and took an assignment of the mortgage, and it was held that his rights were paramount to those of one who, afterwards, had taken a mortgage from the vendee.²

ARTICLE II.—KIND OF POSSESSION.

260. Possession Must be Continuous.

261. When Mortgagor a Member of a Firm—Firm's Possession Not Sufficient.

262. When Mortgagor's Employe Cannot be the Agent of the Mortgagee to Hold Possession.

263. When a Clerk of the Mortgagor Cannot be the Mortgagee's Agent to Hold Possession.

§ 260. **Possession Must be Continuous.**—If the possession of the mortgagee continues, he may employ the mortgagor to look after the property. Thus, a bank took a mortgage on some nursery stock and removed it to another place. Then the bank employed the mortgagor to look after and properly

¹ *Dirigo Tool Co. v. Woodruff*, 41 N. J. Eq. 336.

² *Grice v. Haskins*, 73 Ga. 700.

keep it. This did not deprive the bank of possession, as it had taken actual possession when the mortgage was executed.¹ But if the mortgagee, after taking actual possession, returns the property to the mortgagor's possession, it then becomes liable for the debts of the mortgagor, and the mortgagee has lost his rights as to third persons.²

§ 261. **When Mortgagor is a Member of a Firm.**—There must be a complete change of possession, and other parties interested in business with the mortgagor cannot take possession and use the property in such business. Thus, a mortgagor, a member of a firm, agreed that the property mortgaged should remain with the partnership, and the partnership continuing, is not a sufficient change of possession, the partnership making use of the property.³

The fact that the parties say that there is a change of possession, when in fact there is no change of possession, makes none in law.⁴

§ 262. **When Mortgagor's Employee Cannot be the Agent of the Mortgagee.**—The same rule holds in regard to the possession of mortgaged property by the employe of the mortgagor. Thus, two billiard tables were mortgaged, and the mortgagee consented that they should remain where they were, but that a bartender for the mortgagor should be his agent to hold possession. This was neither in fact nor in law a change of possession, and was ineffectual.⁵

§ 263. **When Clerk of the Mortgagor Cannot Become Agent for the Mortgagee.**—So, a clerk cannot be in the employ of the mortgagor and the agent of the mortgagee. Thus, a party gave a mortgage on his goods in his store, with no change of possession, except the agreement that the clerk should take possession as the mortgagee's agent. He took charge and sold the mortgaged goods, but there was no an-

¹Dayton v. People's Sav. Bank, 23 Kans. 421.

²Moody v. Haselden, 1 S. Car. 129.

³Porter v. Parmley, 52 N. Y. 185.

⁴Bullis v. Montgomery, 50 N. Y. 352.

⁵Brunswick v. McClay, 7 Nebr. 137.

nouncement of change in the business and no change of books. This was no change whatever, so far as the outward acts of ownership and possession were concerned.¹

Other cases occur where the mortgagee endeavors to make the mortgagor his agent, but generally such action is not upheld by the courts. Thus, when a mortgage is executed, and formal delivery of the property to the mortgagee is made by the mortgagor, by going around and pointing out several articles to the mortgagee, and the mortgagee then requests the mortgagor to take charge of the property, who then takes charge accordingly, the property remaining where it was when the mortgage was given, but remains in the mortgagor's charge, is not effectual. This is not sufficient, for actual change of possession imports, at least, something more than a mere legal or fictitious change; the mortgagor cannot remain in possession and call it possession of the mortgagee.²

A case in Massachusetts, at the first impression, would seem to conflict with this doctrine, but the facts are different which seem to control that case. The facts are these: A mortgagee of four hundred tons of coal, part of a larger pile on the wharf of the mortgagor, took possession of the whole pile, with the assent of the mortgagor, and then appointed the mortgagor his agent to sell his coal for him. Here the coal had not been separated, and it devolved upon the mortgagee, by agreement, to separate the coal at first, but the mortgagee allowed the mortgagor to sell it when separated. This was declared to be a sufficient delivery of possession of title in the mortgagee. The court says: "The settled rule of law in this State is, that when there is a contract for the sale of goods, being part of a larger bulk in the possession of the vendor, no property passes to the vendee unless the portion priced in the contract of sale is separated from the mass, or is identified by some mark or designation. * * * The case at bar would very clearly come within this rule if the mortgagor had remained in

¹ Doyle v. Stevens, 4 Mich. 87.

² Camp v. Camp, 2 Hill (N. Y.) 628.

possession of the coal upon his wharf, up to the time of his application for the benefit of the insolvent laws. But the case finds that the mortgagee, with the assent of the mortgagor, had taken possession of the entire lot of coal on the wharf, and had proceeded to sell some part of it in payment of the debt secured by the mortgage. It is not, therefore, a case where the vendor remains in possession of the entire bulk, a part of which he had sold; but the vendee, in pursuance of the contract of sale, had taken possession of the whole for the purpose of separating and securing his part. In this respect the case at bar differs from the numerous class of cases. * * * It appears to a majority of the court that this is a material distinction. * * * In the case at bar the contract was complete and executed. Nothing further remained to be done by the mortgagor. The mortgagee had received from him delivery of the property included in the mortgage, and although it made a part of a larger mass, it was none the less a delivery of the possession by him of the portion included in the mortgage. The property in the part mortgaged passed, it being left to the mortgagee to select and separate it from the whole, which was placed in his possession and control for that purpose. Under such circumstances it is very clear that neither the mortgagor nor those claiming under him could dispute the right of the mortgagee to hold the entire property until the object for which its possession was delivered to him should have been accomplished.”¹

¹ *Weld v. Cutler*, 2 Gray (Mass.) 195.

ARTICLE III.—PRIORITY.

- 264. Perfecting Lien by Taking Possession.
- 265. Two Mortgagees—One Promising in Writing to See the Other Paid—Effect.
- 266. Two Mortgagees Holding Void Mortgages—Effect of Junior Mortgagee Taking Possession First.
- 267. Mortgaging Property Belonging to Another—Ratification by the Owner, who then Re-mortgages the Same Property—Effect.
- 268. Fraud Cannot Give Priority.
- 269. Taking With Notice of a Prior Lien.
- 270. Change of Possession Necessary to Protect Against Subsequent Liens.
- 271. Right of Possession.
- 272. Constructive Possession.
- 273. Holding as Mortgagee's Agent.
- 274. Concurrent Possession of Both Parties.
- 275. Property in the Possession of Third Parties.
- 276. Requisites of Change of Possession.
- 277. Symbolic Delivery and Possession.
- 278. Railway Personality.

§ 264. **Perfecting Lien by Taking Possession.**—If the mortgagee takes possession before any intervening rights accrue, his lien will stand against all other claims, though the execution is insufficient, or if it contains a condition which would make it void except as between parties.¹

A mortgagee in good faith took a mortgage on chattels, the mortgage being duly recorded. His lien was good as against an attaching creditor of the mortgagor, although there was not an immediate delivery and change of possession contemplated by the statute.² Taking possession before any other lien attaches cures defects in acknowledgment and recording; or the record being invalid on account of some irregularity,³ where there is an insufficient description of the property, an identification by taking possession is sufficient to make the transaction valid.⁴

§ 265. **Two Mortgagees—One Promising in Writing to See the Other Paid—Effect.**—Where two mortgagees stand on equal footing and are to be paid out of the same fund, a

¹ *Nash v. Norment*, 5 Mo. App. 545.

² *Lorton v. Fowler*, 18 Nebr. 224.

³ *Chipron v. Freikert*, 68 Ill. 284.

⁴ *Morrow v. Reed*, 30 Wis. 81.

promise in writing of one mortgagee that he will see the other paid, postpones his lien and gives priority to the promisee. And the failure to state in the promise the sum to be paid does not render the contract void, for it is good even as an obligation, under the statute of frauds. Whenever a party promises in writing to pay whatever is owing by one to another, it is sufficient, although no sum is named; just as a promise in writing by one party to convey all the real estate he owns in a certain county is good as a contract, though it takes testimony to prove what that real estate is.¹

§ 266. **Two Mortgagees Holding Void Mortgages—Effect of Junior Mortgagee Taking Possession First.**—So, if there are two mortgagees holding void mortgages on the same property, and the junior mortgagee takes possession first, his lien will be good and superior to the other.²

§ 267. **Mortgaging Property Belonging to Another—Ratification by the Owner, Who Then Re-mortgages the Same.**—If a party mortgages chattels which belong to another, who orally ratifies the conveyance, but then mortgages the same property to another, without notice of the ratification, the last mortgagee will hold the property. Thus, a husband mortgaged a growing crop, which belonged to his wife, and she gave her assent. But this assent was not in writing. The court seems to think, if the assent had been in writing, and properly executed and filed, it would have acted as notice to her mortgagee. It cannot be claimed that she consented to the mortgage and ratified it as her own mortgage, because she refused to sign it or to execute it as her own. The consent to ratify was of the mortgage to her husband. The court said it was too plain for much question or elaboration that the mortgage of the wife as subsequent is not affected by the ratification. The wife's subsequent mortgage of the growing crop, which was her property, to others is her only mortgage. If the other mortgagee had had notice of her

¹Sanders v. Barlow, 21 Fed. Rep. 836.

²Frank v. Miner, 50 Ill. 444.

verbal ratification it could hardly have affected his interest, and certainly not when they had no notice at all.¹

§ 268. **Fraud Cannot Give Priority.**—A landlord's lien was subject to a prior chattel mortgage on the property. The chattel mortgage record was fraudulently canceled. This did not give priority to the landlord's lien.² But when one purchases property after the satisfaction of the mortgage thereon by the mortgagee, he takes it discharged of the claims of an assignee of the mortgage, if the assignment was not recorded at the time of the purchase, and he had no actual notice of the right of the assignee.³

To constitute a *bona fide* purchaser or mortgagee there must be not only an absence of notice but also payment of, or fixed liability for, the consideration.⁴

In Vermont a bill of sale executed is good between the parties as a common-law mortgage. It must be held subordinate to a later mortgage, executed agreeably to the statute, the mortgage being duly executed upon good consideration and vests in the mortgagee the title to the property subject to the rights of the mortgagor to redeem upon payment of the debt. If there be no stipulation in the mortgage to the contrary, the possession of the mortgagor is merely permissive, and would terminate by transfer, or in any manner that sets the rights of the mortgagee at defiance.⁵

§ 269. **Taking With Notice of Prior Lien.**—In those jurisdictions where actual notice is equivalent to recording of the mortgage, the question of what is actual notice is difficult of solution. What collateral facts are sufficient to thus charge a purchaser, is a question variously decided. But the criterion most generally adopted is, whether the particular facts

¹ *Maier v. Davis*, 57 Wis. 212.

² *Rand v. Barrett*, 66 Iowa 731.

³ *Bank v. Anderson*, 14 Iowa 544; *Bowing v. Cook*, 39 Iowa 202; *Cornog v. Fuller*, 30 Iowa 212.

⁴ *Funk v. Paul*, 64 Wis. 35; *Nantz v. McPherson*, 7 T. B. Mon. (Ky.) 597; 18 Am. Dec. 216; *Cummings v. Coleman*, 7 Rich. Eq. (S. C.) 509; 62 Am. Dec. 402; *Wynn v. Carter*, 20 Wis. 107.

⁵ *Longey v. Leach*, 57 Vt. 377.

would lead a reasonably prudent man, acting honestly, to make further inquiries before consummating a transaction concerning the property. Judge Clopton says that this criterion leaves a broad margin for the exercise of discretion and judgment, but it is perhaps as definite as can be laid down, and is applicable in the greater number of instances. Says he :

“Information, personally communicated, which constitutes actual notice, proved by positive evidence, must assert the existence of a conflicting claim or right as a fact, though it need not impart full information of its details, nature or extent. Information of facts which put a party upon inquiry, when such inquiry, if prosecuted with due diligence, would ‘certainly lead to knowledge or discovery of a conflicting claim or right, is an equivalent or substitute for actual notice, or, as generally defined, circumstantial evidence from which actual notice is absolutely inferred. The logical sequence is, that the particular facts, in order to authorize the inference of actual notice, or to constitute a failure to inquire, a substitute for actual notice, must at least suggest the probability of an adverse interest or right—must be of kind and amount as would excite in the mind of a prudent man a reasonable apprehension of the existence of some antagonistic incumbrance or claim.”

Thus, a party mortgaged his crops, but the deed was not recorded until he had executed another mortgage. The second mortgagee, before taking his mortgage, inquired of the mortgagor whether the first mortgagee did not have a mortgage against him and was informed that he did, but that it did not include the crop on which he was giving the second mortgage. It was held that this information was not sufficient to put the second mortgagee on inquiry as to what was included in the prior mortgage. The court held that it is a harsh rule, tending to obstruct and defeat daily business transactions, which declares a party to be a *mala fide* purchaser, or charges him with notice of a prior unrecorded incumbrance because of failure to make inquiry as to its

contents, when the same person who informed him of its existence also informed him at the same time that it does not affect the subject-matter of his purchase, in the absence of any probable cause to suspect the truth of the latter statement.¹

In Missouri, one who takes a mortgage of chattels, knowing that the mortgagor held them under an agreement with the vendor that they shall remain the property of the latter until paid for, takes his mortgage subject to such agreement.²

§ 270. **Change of Possession Necessary to Protect Against Subsequent Liens.**—Neither a mortgage nor pledge, nor a lien upon personal property, at common law, can be made available against subsequent attachments, without a change of possession to the mortgagee before the subsequent lien accrues.³

If it appears that the possession remains in the mortgagor until an attachment is levied, the mortgagee loses his lien. As a pledge cannot be created without a change of possession, the lien would be lost by the surrender of the thing to the pledgor. The same is the law in regard to a lien, whether created by a usage of trade, by custom or by express contract. A mortgage might exist between the parties without a change of possession, but without a substantial change of possession it would be unavailing as against creditors of the mortgagors.⁴

§ 271. **Right of Possession.**—The mortgagee is entitled to possession as against the mortgagor, and against subsequent purchasers of the property who have not taken possession; but, without taking possession, the mortgage is void as against execution creditors and innocent purchasers.⁵

The mortgagee may take possession of the property,

¹ *Simpson v. Hinson*, 88 Ala. 527. See Section 397.

² *Kingsland v. Drum*, 80 Mo. 646.

³ *Russell v. Fillmore*, 15 Vt. 130.

⁴ *Daubigny v. Duval*, 5 Term R. 604; *Newsom v. Thornton*, 6 East 17.

⁵ *Coble v. Nonemaker*, 78 Pa. St. 531; *Beamer v. Freeman*, 84 Cal. 554.

although he be in joint possession with the mortgagor and creditor of his to whom he had given a bill of sale.¹

§ 272. **Constructive Possession.**—Generally, the possession taken under a chattel mortgage must be actual, not merely constructive—no mortgage being filed.² But when heavy articles like pig iron are mortgaged, and the mortgage is not placed on file, and there is no actual delivery or apparent change of possession, there must be a sufficiently clear and unequivocal designation of the mortgage to creditors and subsequent purchasers. It is for the jury to decide, under proper instructions, what is sufficient notice thereof.³

When the subject-matter is growing crops, the possession is considered to be in the mortgagee until the crops are harvested, when, generally, he must take manual possession of them.⁴ In one case a delivery of possession of a large lot of logs was held sufficient, when the mortgagor went with the mortgagee to the place of location, and designated them as the property described in the mortgage.⁵

The nature of delivery must depend upon the bulk and character of the property mortgaged.⁶

A party had a mortgage upon the furniture of a hotel. The mortgagor gave him the keys, and went with him through the hotel, designating the furniture in each room, and they agreed that it should be considered that the property was stored for the mortgagee, who took away a napkin as a symbolic delivery. This was not an actual and continued possession to sustain a lien as against creditors.⁷

§ 273. **Holding Possession as Mortgagee's Agent.**—Where

¹ *Coty v. Barnes*, 20 Vt. 78. A person may attach goods in his own hands belonging to a defendant, or money which he himself owes to the defendant. *Graigle v. Notnagel*, 1 Pet. C. C. 245; *Grayson v. Veech*, 12 Martin (La.) 688.

² *Crandall v. Brown*, 18 Hun (N. Y.) 461.

³ *Anderson v. Brenneman*, 44 Mich. 198.

⁴ *Ticknor v. McClelland*, 84 Ill. 471.

⁵ *Morrow v. Reed*, 30 Wis. 81.

⁶ *Wright v. Tetlow*, 99 Mass. 397.

⁷ *Nat. Bank v. Sprague*, 20 N. J. Eq. 13.

a chattel mortgage is executed, and the mortgagee takes actual possession of the property, and afterwards places it in the actual possession of the mortgagor, as his agent and clerk, there has not been, as a general rule, a sufficient change of possession as against creditors.¹

A conversation between a mortgagor and the mortgagee's agent was, by the former, "You have a mortgage; all that is yours; you can have it," referring to a crop of cotton. Then the agent instructed him to haul the cotton to a gin and have it ginned, and carry it to town. This did not show a delivery of the cotton to the mortgagee.²

A party hired a house containing machinery, which he bought, paying part cash, and giving notes for the rest. It was agreed that if the notes were not paid, the vendor should own the property. Then the vendee mortgaged it to secure an existing debt. He afterwards absconded, and the mortgagee took possession of the machinery, but was induced by the vendor to leave it there under the impression that he would not claim it on his own or vendee's account. Then the vendor seized it under a distress, and it was sold to him as the vendee's property. But the court decided that the machinery belonged to the mortgagee.³

When a mortgagor retains possession of the property, but afterwards takes possession as an agent of the mortgagee, and especially where the mortgagor holds the property, and uses it as his own, and nothing about the property to inform third persons that any change has been made, such possession is void as to creditors and purchasers.⁴

§ 274. **Concurrent Possession of Both Parties.**—The change of possession must be such as to be apparent to those having occasion to observe it.⁵ So, concurrent possession of vendee

¹ *Swiggett v. Dodson*, 38 Kans. 702.

² *Wetzler v. Kelly*, 83 Ala. 440.

³ *Butler v. Gannon*, 53 Md. 333.

⁴ *McCarthy v. Grace*, 23 Minn. 182; *Doyle v. Stevens*, 4 Mich. 87; *Brunswick v. McClay*, 7 Nebr. 137; *Grant v. Lewis*, 14 Wis. 487.

⁵ *Trask v. Bowers*, 4 N. H. 309; *Lang v. Stockwell*, 55 N. H. 561.

and vendor is not sufficient as to third persons.¹ So, where a farmer conveyed his farm and personalty on it, and took a bond with certain conditions for his support and that of his wife, and also took a mortgage on the farm to secure the bond, the farm being carried on, the grantor and grantee living on it, is not a sufficient change of possession as to third parties.²

The vendee must take actual possession, and the possession must be open, notorious and unequivocal; such as to apprise the people that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying the relation to the thing sold which owners of property generally sustain to their own property. The possession must be exclusive of the vendor. A concurrent possession is not admissible.³

The statute admits of no excuse for leaving personal property, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee.⁴

§ 275. **Property in the Possession of Third Persons.**—Where a mortgage has been made and the bailee of an attaching officer, while the custody of the goods is in him, consents to hold the goods as servant of the mortgagee, and actually holds for him, this makes such a delivery and possession by the mortgagee as to give him a valid lien.⁵

“Upon the sale of articles which are at the time in the house of the vendor, they should be removed or a control over them be kept in some way. So, perhaps, where they are on the land of the vendor, for that is his possession. But if they are in the house of a third person, a delivery to

¹ Sumner v. Dalton, 58 N. H. 295.

² Flagg v. Pierce, 58 N. H. 348.

³ Cook v. Mann, 6 Colo. 21; Wilcox v. Jackson, 7 Colo. 521.

⁴ Bassinger v. Spangler, 9 Colo. 175; Sweeney v. Coe, 12 Colo. 485.

⁵ Wheeler v. Nichols, 32 Me. 233.

the owner of the house to hold, as the agent of the vendee, might be a substantial change, so that it would not be necessary to remove them in order to take and continue the possession. The vendee would have possession by his agent, and this would seem to be a change of the possession within the rule. There may be a change of possession without a change of locality. If property which is not within the actual possession of the owner, be sold and delivered to the vendee, leaving it in the place where it was situated, it is not leaving it in possession of the vendor, and creditors should not be misled because it remains in the same locality. * * *

In the present case the manual possession was not in the mortgagor nor in the mortgagee, at the time when the attachment was made, but the legal possession was in the mortgagee. The property was partly on a public landing. This was in the possession of the mortgagee after the delivery to him. So of that part which was at Whitman's mill. If Whitman be regarded as having actual possession, he had it for the party having the right of possession. The mortgagee took actual possession, and that possession was not relinquished nor the prior possession restored by leaving the property where it was at the time of the delivery."¹

In a mortgage of goods and chattels, when the property is in the actual possession of a third person, it is not necessary to the validity of the assignment that it be accompanied by an immediate delivery of the property.²

§ 276. **Requisites for Change of Possession.**—In the absence of stipulations to control, the mortgagee of personal property has the right of possession, and it is immaterial what may be the form of the mortgage, provided there be no time as to the right of possession. The rule adopted in a real-estate mortgage cannot apply, that the mortgagee has no right of possession until default.³

The sale of personal property, in order to be valid against

¹ *Morse v. Powers*, 17 N. H. 286.

² *Nash v. Ely*, 19 Wend. (N. Y.) 523.

³ *Wolfley v. Rising*, 12 Kans. 585; *Marsh v. Wade* (Wash.), 20 Pac. Rep. 578.

the creditor of the vendor, should be accompanied with an open, visible and substantial change of possession, such as indicates a change of ownership; and a sufficient explanation should exist to show why the possession was not changed. What is necessary to constitute a change of possession must depend upon the particular circumstances.¹

Upon the sale of articles which are at the time in the house of the vendor, they should be removed and control over them kept in some way, but if they are in the house of a third party, a delivery to the owner of the house to hold as the agent of the vendee may be a substantial change, so that it would not be necessary to remove them in order to take and continue in possession of them.²

A mortgage of personal property duly executed, the mortgagor retaining possession, is valid against execution creditors with notice.³ And this notice may be either actual or constructive. It is actual when the purchaser either knows of the existence of the adverse claim or title or is conscious of having the means of knowledge, and does not use them, whether his knowledge is the result of a direct communication or is gathered from facts and circumstances.⁴

The authorities agree that where a party designedly abstains from making inquiries for the purpose of avoiding knowledge, such action is *mala fide* in itself, and will not relieve the party from the effects of the knowledge his inquiries would have developed.⁵

But an invalid mortgage cannot be made the basis of a claim of possession of mortgaged property by the mortgagee to give him such possession.⁶

§ 277. **Symbolic Delivery and Possession.**—Where articles are of a bulky nature, so that only a symbolic delivery can

¹ Clark v. Morse, 10 N. H. 236.

² Morse v. Powers, 17 N. H. 286.

³ Allen v. McCalla, 25 Iowa 464.

⁴ Mayor v. Williams, 6 Md. 235.

⁵ Jones v. Smith, 1 Harr. Ch. (Mich.) 43; Whitehead v. Jordan, 1 Younge & Coll. Ex. 328.

⁶ Ruiter v. Plate, 77 Iowa 17.

be made, it must be such a delivery as would be necessary as against a third person in case of an absolute sale of those chattels.¹ The symbol employed must have been delivered with the intention of transferring title to the property sold.² And, in general, the formalities of a delivery necessary to protect a vendee in such cases, will adapt themselves, in a measure, to the nature and situation of the property sold. Thus, of ponderous articles, a constructive delivery will be sufficient.³

§ 278. **Railway Personalty.**—It has been decided in Illinois that a mortgage of railway property, including the personal property, does not come under the recording act, when possession is not taken of the property; that the act does not control chattel mortgages on railway property.⁴ This doctrine is also upheld by the United States Supreme Court. Nor does it embrace mortgages of personal property of railway corporations used with its realty for railway purposes.⁵ So, vendor of rolling-stock to railway company will be protected against prior mortgage lien, although his contract was not recorded, his possession being, by agreement, the possession of the railroad company.⁶ Neither does the act refer to case where vendor delivers property to vendee, retaining, by bill of sale, a contract lien thereon. In such case unpaid vendor of railway supplies may enforce contract lien against purchaser with notice, although statute is not complied with.⁷

¹ *Wright v. Tetlow*, 99 Mass. 397.

² *Clark v. Draper*, 19 N. H. 419; *Cartwright v. Phoenix*, 7 Cal. 281.

³ *Shurtleff v. Willard*, 19 Pick. (Mass.) 210; *Leisherness v. Berry*, 38 Me. 83; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Terry v. Wheeler*, 25 N. Y. 520; *Hayden v. Demets*, 53 N. Y. 426; *Taylor v. Richardson*, 4 Hous. (Del.) 300; *People's Bank v. Gridley*, 91 Ill. 457; *Audenreid v. Randall*, 3 Cliff. C. C. 99; *Newcomb v. Cabell*, 10 Bush (Ky.) 460; *Puckett v. Reed*, 31 Ark. 131. See Section 141.

⁴ *Cooper v. Corbin*, 105 Ill. 224.

⁵ *Hammock v. Loan and Trust Co.*, 105 U. S. 77.

⁶ *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Car Co.*, 99 U. S. 256; *Huidekoper v. Locomotive Works*, 99 U. S. 258. But see a contrary doctrine, *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.

⁷ *Chicago, &c., R. R. Co. v. Union Rolling Mills*, 109 U. S. 702. But see *Porter v. Dement*, 35 Ill. 478. Personal property of a railway company, such as supplies and detached property not in permanent use as equipment, must conform to the statute as to recording, or be taken possession

PART II.—REGISTRATION OF THE INSTRUMENT.

CHAPTER VIII.

STATUTORY LAWS OF REGISTRATION.

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§ 279. In General.—In most of the States and Territories laws have been enacted which provide for the recording or

of by the mortgagee. *Hunt v. Bullock*, 23 Ill. 320. It is also held that a mortgage of railway personalty for a debt not maturing in two years, being the statutory limit of time for a chattel mortgage, is void. *Hunt v. Bullock*, 23 Ill. 320. But in another case it was decided that a mortgage for more than a period of two years on personalty was valid for two years. *Cook v. Thayer*, 11 Ill. 617.

filing of mortgages of chattels. This recording or filing operates as a notice to creditors and purchasers of the mortgagor. These statutes provide that the mortgagor may keep possession of the mortgaged property when the mortgage has been properly filed or recorded.¹

Many of the States also provide for a refiling under certain conditions.

The statutory provisions are different in many ways, and for a proper understanding of the decisions which have been made under them, it is necessary to give a synopsis of their provisions. Recording or filing a chattel mortgage in most of the States is an equivalent to a change of possession, as required at common law. Between the parties no change of possession is necessary to make the mortgage valid. So, between the parties no recording or filing is necessary. In some States it is only necessary to file the mortgage, and in others it must be recorded.

The object and purpose, so far as subsequent purchasers and mortgagees are concerned, of registration, is to protect them against secret or unknown conveyances, by reason of which they, purchasing in ignorance of prior vested rights, might be prejudiced, and that, under such statutes, actual notice, in many States, of the prior conveyance has generally been deemed to make the fact of non-registration immaterial. Want of notice is an essential element of good faith, as those terms are used in registry statutes and in equity jurisprudence.²

These statutes do not apply in the case of a purchaser or mortgagee who has not been defrauded by the prior conveyance.

So, a purchaser or mortgagee, with legal notice of a prior conveyance, is not defrauded by reason of the fact that possession of the property has been retained by the original owner.³

¹ *Bank v. Ellis*, 30 Minn. 270.

² *Grimstone v. Carter*, 3 Paige (N. Y.) 421; *Willoughby v. Willoughby*, 1 T. Rep. 763.

³ *Tolbert v. Horton*, 31 Minn. 518.

§ 280. **Alabama.**—Conveyances of personal property to secure debts, or to provide indemnity, are inoperative and void against creditors and purchasers without notice until recorded in the office of the judge of probate, unless the property is brought into the State subject to such incumbrances, in which case they must be registered within four months. If such property is removed to a different county from that in which the grantor resides, the mortgage must be recorded within six months from the removal, or it ceases to have effect as to creditors and purchasers from the grantee without notice.¹

The mortgage must be recorded in the county where the mortgagor resides, and also in the county where the property is at the date of the execution. If the property be removed to another county, the mortgage must be again recorded within six months from such removal, in the county to which it is removed.² No renewal of chattel mortgages is necessary.

Mortgages of personal property are invalid unless they are in writing, and subscribed by the mortgagor.³

A mortgage of personal property admitted to record operates as a constructive notice in the same manner as if it had been properly acknowledged.⁴

They are recorded in the recorder's office in the county in which the mortgagor resides. If the mortgaged property has a fixed *situs* in the State at the time of the execution of the mortgage, it must be recorded in the county where the property is located, when the parties to it are non-residents, in order to protect the property against the mortgagor's creditors.⁵

When a mortgage of personal property has been duly recorded in the county where the property is at the time of its execution, the removal of the property to another county does not render it necessary to have the mortgage recorded.

¹ Code, § 1814.

² Code, § 1806.

³ Code, § 1731.

⁴ *Bickley v. Keenan*, 60 Ala. 293.

⁵ *Hardaway v. Semmes*, 38 Ala. 657.

in the latter county, nor in a third county, where its removal from the second is inside of six months. The law means that the removal shall equal six months in one county. The sum of the two removals in the second and third counties may exceed six months, but the mortgage need not be recorded again.¹

A mortgage to which personal property is subject at the time of its removal into Alabama, and which has been recorded in the proper county within four months after arrival of such property, is superior to the lien of an attachment levied upon the property before the mortgage was recorded.²

All loans in writing, wills or conveyances creating estates in personal property on condition, in reversion or remainder, or in which the use is separated from the right, and under which possession is suffered to remain three years with the party entitled to the estate or use, vest an absolute estate in the person so having possession for such number of years, as to creditors and purchasers of such person, unless such loan, will or conveyance is recorded within such time, in the county where such property is.

A conditional sale, reserving title in the vendor until the purchase price is fully paid, such as sewing-machine sales or contracts, is valid, and neither the vendee nor his creditors and subvendees acquire title until the price is fully paid.³

Under Section 1818, a mortgagee is a purchaser, within the statute, where the mortgagor had been left in possession of a piano by her daughter for more than four years, and had used and mortgaged same as part of the furniture of her boarding-house.⁴

A mortgage of personalty is a "conveyance of property" within the meaning of the Code, § 1798, admitting such conveyances in evidence, without further proof of execution,

¹ *Wilkinson v. King*, 81 Ala. 156.

² *Johnson v. Hughes*, 8 South. Rep. 147.

³ Code, §§ 1817, 1818.

⁴ *Carr v. Lester*, 8 South. Rep. 35.

when they have been acknowledged or proved and recorded as required by law.¹

§ 281. **Arizona Territory.**—Chattel mortgages may be given upon all personal property except merchandise, and it, or a certified copy, may be filed with the recorder. The parties to it must give their residence, sum secured and where payable, and attach an affidavit that it was made without any design to defraud or delay creditors. After recording, the mortgagor may retain possession of the property, if so stipulated. If the property is removed, the mortgagee has one month to file copy of mortgage in county to which the property is taken.²

Written evidence of conditional sales must be acknowledged and recorded, to be valid as to creditors and purchasers, and to impart notice to all parties.

§ 282. **Arkansas.**—Chattel mortgages must be proved as other mortgages. They may be filed and not recorded, at the option of the mortgagee. If not intended to be recorded, they must bear this indorsement: "This instrument to be filed but not recorded." They are liens from the time of filing. When not recorded they become void at the end of the year, unless the mortgagee or his agent shall file an affidavit showing the interest the mortgagee has in the mortgaged property, and the amount due on it. This must be filed within thirty days next before the end of the year.³

In the absence of stipulations to the contrary, the mortgagee of personal property has the legal title thereto, and the right of possession.

Conditional sales of personal property will be upheld if made in good faith. They will be presumed to be mortgages, in the absence of clear evidence. The test is, whether there is a debt and an obligation to pay it.

§ 283. **California.**—Chattel mortgages are void against creditors and subsequent purchasers and incumbrancers in

¹ *Patterson v. Jones*, 8 South. Rep. 77.

² *Com. Laws*, 1877, ch. 82, §§ 3646, 3650.

³ *Mans. Dig.* §§ 4750, 4751.

good faith and for value, unless such mortgages show upon their face the residence of the mortgagor and mortgagee, and their profession, trade or occupation, the rate of interest to be paid, and when and where payable; and the mortgagor and the mortgagee must each make affidavit that the mortgage is *bona fide* and without any design to defraud, delay or hinder creditors, and must be acknowledged or proved, certified and recorded in like manner as grants of real property. A chattel mortgage must be recorded in the county where the mortgagor resides and in the county where the property is located, or to which it may be removed.¹

These provisions do not apply to vessels of the United States.

The design of this statute is to substitute the record of the mortgage for the actual delivery and change of possession,² otherwise required by the Code.³

§ 284. **Colorado.**—Chattel mortgages may be given for any period not exceeding two years, if the principal of the debt secured does not exceed \$2,500, and not exceeding five years, if said principal be more than \$2,500, and not more than \$20,000, and not exceeding ten years, if said principal exceeds \$20,000, notwithstanding the property mortgaged remains with the mortgagor, provided it is so stated in the mortgage. In all cases where mortgages are given to secure more than \$2,500, there shall be filed, annually, in the recorder's office wherein the mortgage is recorded, a sworn statement of the mortgagees, or one of them, that the mortgage was given in good faith to secure the payment of the money mentioned therein; that said sum of money is still unpaid, or, if part has been paid, the sum remaining unpaid.⁴

Mortgages of live stock may cover the increase or any part thereof, as may be provided therein.

Mortgages must be recorded in order to bind third parties

¹Civil Code, §§ 2955, 2957.

²Beamer v. Freeman, 84 Cal. 554.

³Civil Code, § 3440.

⁴Gen. Stat. § 160 *et seq.*

without actual notice, and must be acknowledged as in case of deeds, before being recorded, except in cases where the indebtedness does not exceed \$300, and the time in which it is to mature does not exceed six months, the mortgage shall not then be required to be recorded, but may be filed with the proper officer, and when so filed shall be held to be of record. The form of acknowledgment is as follows: "This mortgage was acknowledged before me by —, this — day of —, A. D. 189—."

All sales must be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, or they will be conclusively fraudulent as against creditors.¹

§ 285. **Connecticut.**—Mortgages of personal property, except the articles named in Section 176, are not valid against other than the mortgagor, unless actual and continued possession of the property be given to the mortgagee.

Mortgages of the articles specified in Section 176 must contain a particular description of such personal property, and must be executed, acknowledged and recorded like deeds of land.²

§ 286. **Conditional Sales.**—Conditional sales, wherein it is agreed that the title shall remain in the vendor until some future time, or the happening of some event, as, for instance, the payment of the purchase price, are valid, and possession of the property may be delivered without any notice as to the title.³

§ 287. **Delaware.**—A chattel mortgage must be recorded within ten days after its execution, and acknowledged in the county where the property is located, and when so recorded, is valid for three years. It must be renewed every three years. The mortgage must be accompanied with an affidavit that the mortgage was made for the *bona fide* purpose of securing a debt.

¹ Gen. Stat. § 1523.

² Gen. Stat. §§ 3016, 3017.

³ Gen. Stat. § 920.

This affidavit may be made by either the mortgagor or mortgagee, or by both of them.¹

No sales, whether with or without a bill of sale, of any goods or chattels within the State, shall be good at law, except as against the vendor, or shall alter the property in such goods or chattels, unless a valuable consideration for the same shall be paid or secured in good faith, and unless the goods and chattels shall be actually delivered into the possession of the vendee as soon as conveniently may be after the sale. If such goods and chattels so sold shall afterwards come into and remain in the possession of the vendor, the same shall be liable to the demands of the creditors.²

§ 288. **District of Columbia.**—In the District of Columbia chattel mortgages are seldom used. Deeds of trust are taken as security for debts or loans. No bill of sale, deed of trust or mortgage for property exempt by law from execution is binding unless signed by the wife of the debtor, if he has one. All deeds of trust, deeds, mortgages, conveyances, covenants, agreements or any instrument of writing which by law is entitled to be recorded in the office of the recorder of deeds, shall take effect and be valid as to creditors and as to subsequent purchasers from the time such instrument, after having been acknowledged, proved or certified, be delivered to the recorder of deeds for record, and from that time only.³

§ 289. **Florida.**—By act approved November 15th, 1828, it is declared that no mortgage of personal property shall be effectual or valid to any purpose whatsoever, unless such mortgage shall be recorded in the office of record for the county in which the mortgaged property shall be at the time of the execution of the mortgage, unless the mortgaged property be delivered at the time of the execution of the

¹ Laws, vol. 15, ch. 477, §§ 1, 3, 4.

² Rev. Stat. ch. 63, § 4.

³ Rev. Stat. § 798.

mortgage, or within twenty days thereafter, to the mortgagee, and shall continue to remain truly and *bona fide* in his possession.

Act approved June 1st, 1889, provides that "hereafter no chattel mortgages shall be valid or effectual for any purpose unless the property included in the said mortgage shall, within sixty days from the execution thereof, be delivered to and remain in the possession of the mortgagee, or unless said mortgage shall be recorded as heretofore provided by law, within ninety days from the execution thereof."

They are admitted to record upon the same proof as mortgages of real property, or by proof being made upon oath by at least one credible person, before the recording officer, of the handwriting of the mortgagor, in cases in which there shall be no attesting witnesses to the mortgage. There is no provision for renewal of chattel mortgages.

Conditional sales of personal property, where the title is retained in the vendor, are valid against all persons claiming under the vendee, and such sales are not chattel mortgages within the meaning of the statute of the State.¹

§ 290. *Georgia*.—The mortgage must be executed in the presence of, and attested by, or proved before a notary public or justice of any court in the State, or any clerk of the Superior Court, and must be recorded at once in the recorder's office of the county where the mortgagor resides. When the property is located in some other county than that of the mortgagor's residence it must be recorded in the county where the property is situated at the time of the execution of the mortgage, in addition to the record in the county of the mortgagor's residence.² If a non-resident is the mortgagor, then the mortgage must be recorded in the county where the property is located.³

A mortgage in this State is only a security for a debt and

¹ *Campbell Printing Press and Man. Co. v. Walker*, 22 Fla. 412.

² *Acts of 1876*, p. 34.

³ *Rev. Code*, § 1946.

passes no title, and may cover a stock of goods or other things in bulk.¹

Contracts for sale of personal property accompanied by delivery, upon condition that title shall remain in the vendor until the purchase price is fully paid, are invalid as against third persons, unless in writing, executed, attested and recorded as in case of chattel mortgages.²

§ 291. Idaho.—The mortgagor must acknowledge the instrument, and also make affidavit that the mortgage is made in good faith, with no design to hinder or delay creditors. Record must be made in the county where the mortgagor resides, and also where the mortgaged property is situate.

The mortgagee has one day for every twenty miles between his residence and recorder's office to record his mortgage, as against an attachment or subsequent incumbrances. By written consent of the mortgagee, the mortgagor may remove the property to another county. In case of such removal, unless the mortgagee, within ten days after such removal, records his mortgage in such county, or takes actual possession of the property, the mortgage is void as to the rights of third persons.³

§ 292. Illinois.—No mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be given and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument acknowledged and recorded. Such instrument shall be acknowledged before a justice of the peace (or police magistrate) of the town or precinct where the mortgagor resides, or, if there be no acting justice of the peace in the town or precinct where the mortgagor resides, then such instrument may be acknowl-

¹ Code, §§ 1954-1957.

² Code, § 1955a.

³ Rev. Stat. §§ 3385-3398.

edged before the county judge of the county in which the mortgagor resides; or if the mortgagor is not a resident of the State at the time of making the acknowledgment, then before any officer authorized by law to take acknowledgments of deeds. The certificate of acknowledgment may be in the following form: "This [name of instrument] was acknowledged before me by [name of grantor] (when the acknowledgment is made by a resident insert the words 'and entered by me'), this — day of —, 18—."

If the acknowledgment is by a resident of the State, the justice of the peace or county judge shall enter in his docket a memorandum thereof, substantially as follows:

"A. B. [name of mortgagor] to C. D. [name of mortgagee]; mortgage of [here insert description of the property as in the mortgage].

"Acknowledged this — day of —, A. D. 18—."

Such instrument, acknowledged as provided, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument was executed; or in case the mortgagor is not a resident of the State, then in the county where the property is situated and kept, and shall thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation, such time not exceeding two years, unless within thirty days next preceding the maturity of the note or obligation for which such instrument is given, the mortgagor and mortgagee, his or their agent or attorney, shall file for record an affidavit setting forth particularly the interest which the mortgagee has by virtue of such mortgage, and if it is for the payment of money, the amount remaining due and unpaid, and the time for which the said mortgage is extended, which shall not exceed the term of two years, upon which affidavit the clerk shall indorse the time when the same was filed, and the said mortgagee shall, within the said thirty days, file a certified copy of said affidavit with the

justice of the peace before whom said mortgage was acknowledged, or his successor in office.¹

A mortgage by a married man or woman, made after June 30th, 1889, on household goods, is not valid unless joined in by wife or husband.²

§ 293. **Instances.**—Failure to make an entry by justice of the peace in his docket, invalidates the mortgage as to lienholders and subsequent purchasers.³

Police magistrates may take acknowledgments.⁴

When the mortgagor is a resident of the State he must acknowledge the mortgage in the town or district where he resides or it is invalid, and district means election district.⁵

Chattel mortgages acknowledged before a justice residing out of the district or town, and not recorded, are void as to creditors.⁶

A chattel mortgage acknowledged before a notary public, with usual form of acknowledgment of real-estate mortgages, is void, although the purchaser of the property knew of the alleged mortgage.⁷

When a chattel mortgage is acknowledged before a justice of the peace residing in the same precinct with the mortgagor, the acknowledgment will not be bad because it was taken in another township or precinct.⁸

¹ Hurd's Rev. Stat. p. 830, §§ 1, 2, 3, 4.

² Laws of 1889, tit. "Chattel Mortgages."

Conditional sales, as to recording, are governed by this recording act. Where husband and wife shall be living together, no transfer or conveyance of goods and chattels between such husband and wife shall be valid as against the rights and interests of any third person, unless such transfer or conveyance be in writing, and be acknowledged and recorded in the same manner as chattel mortgages are required to be acknowledged and recorded by the laws of this State, in cases where the possession of the property is to remain with the mortgagor. Rev. Stat. ch. 68, § 9, ¶ 2. This does not apply to choses in action transferred between husband and wife. *Cole v. Marple*, 98 Ill. 58.

³ *Koplin v. Anderson*, 88 Ill. 120.

⁴ *Herkelrath v. Stookey*, 58 Ill. 21; *Ticknor v. McClelland*, 84 Ill. 471; *Nelson v. Kessinger*, 16 Ill. App. 185.

⁵ *Henderson v. Morgan*, 26 Ill. 431.

⁶ *Stevenson v. Browning*, 48 Ill. 78.

⁷ *Long v. Cockern*, 128 Ill. 29.

⁸ *Durfree v. Grinnell*, 69 Ill. 371. Although the justice who takes the acknowledgment of a chattel mortgage may be liable in damages which his

§ 294. **Indiana.**—Chattel mortgages are made in the usual form of an absolute bill of sale, with a clause of defeasance and stipulations as to possession as to vendor. They must be acknowledged and recorded in the recorder's office of the county where the mortgagor resides, within ten days after execution, or they will be void as against third persons, unless possession of the mortgaged property is delivered to and retained by the mortgagee. Every such mortgage is held to be recorded from the time it is left at the recorder's office for that purpose. There is no statutory form for chattel mortgages.¹

When the instrument is silent as to possession, the mortgagee is entitled to immediate possession upon the execution of the mortgage.²

Personal property sold and delivered to a vendee under an agreement that the title shall not pass until the purchase-money is paid, and the property to remain the vendor's until the condition is fulfilled, upon breach of the condition replevin can be had by the vendor as against *bona fide* purchasers.³

§ 295. **Indian Territory.**—Chattel mortgages must be proved before a judge or clerk of the United States courts, United States commissioner or notary public in the Territory; before the judge or clerk of any court of the United States, or any State or Territory thereof having a seal, mayor of a city having a seal of office, or notary public, when out of the Territory. Chattel mortgages may be filed and not recorded, at the option of the mortgagee. "This instrument to be filed and not recorded" must be indorsed on same if only to be filed. The affidavit showing what inter-

neglect to enter an inventory embraced therein on his docket may have caused, yet such neglect does not invalidate the mortgage. *Harlow v. Berger*, 30 Ill. 425.

The entry in his docket by a justice of the peace is essential to the validity of the mortgage as to third persons. *Koplin v. Anderson*, 88 Ill. 120.

An entry in a special docket kept for that purpose is a compliance with the statute. *Pike v. Colvin*, 67 Ill. 227.

¹ 1 Rev. Stat. §§ 4913, 4914.

² *Broadhead v. McKay*, 46 Ind. 595.

³ Rev. Stat. 1881, § 4924.

est the mortgagee has in the property, and the amount due, must be filed thirty days prior to the expiration of one year, or the mortgage becomes void. The mortgagor is allowed to remain in possession until condition broken, but not with the power of disposition. The clerk of the United States court in the Indian Territory is *ex-officio* recorder of deeds.

Records are kept at Muskogee, in the Creek nation; at South McAlester, in the Choctaw nation, for the second division, and at Ardmore, in the Chickasaw nation, for the third division.¹

§ 296. Iowa.—Chattel mortgages must be recorded immediately in the county where the holder of the property resides, in order to be valid against existing creditors or subsequent purchasers without notice. A chattel mortgage duly recorded is good against third persons, even if the mortgagor remains in possession.²

Chattel mortgages need not be renewed, and are good until the cause of action thereunder is barred by statute of limitations, which is ten years. In the absence of stipulation to the contrary in the mortgage, the mortgagee is entitled to the possession of the property.³

An attachment may be levied on personal property, not exempt from execution, covered by a mortgage, when the debt is due, by paying or tendering to the mortgagee the amount of the mortgage debt and interest accrued, or depositing the amount with the clerk of the District Court of the county wherein the mortgaged property is found, payable to the order of the holder of the mortgage. If the debt is not due, the deposit must include interest till the debt is due, not exceeding a period of sixty days after the date specified in the mortgage, whereupon the attaching creditor shall be subrogated to all the rights of the holder of the mortgage.

The execution or attaching creditor shall have the right

¹The law of Arkansas applies, See Mans. Dig. ch. 110.

²Title XIII. ch. 4.

³Title XIII. ch. 4.

to controvert the statement of indebtedness if he give notice, in writing, at the time of the deposit, and the clerk shall hold such deposit until the matter is determined. If the attaching or judgment creditor fail to sustain his claim against the mortgage, he shall pay to the holder of the mortgage interest upon the debt at the rate of ten per cent. per annum, together with costs of the proceeding and an attorney's fee of ten per cent. on the amount of the debt. This does not affect the right of any creditor to contest for any reason the validity of the mortgage, which he may do by levying directly on the mortgaged property. The mortgagee, on written demand of a creditor, his agent or attorney, except in case of the mortgage of exempt property, shall deliver to the creditor a statement under oath showing the nature and amount of the original debt secured by the mortgage, the date and amount of each payment, if any, and an itemized statement of the amount due and unpaid.¹

No sale, contract or lease, wherein the transfer of the title is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee, or lessee in actual possession thereof without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as a chattel mortgage.²

§ 297. **Kansas.**—Every chattel mortgage or conveyance intended to operate as a chattel mortgage, when the mortgagee does not take possession of the mortgaged property, is absolutely void as against the creditors of the mortgagor, and subsequent purchasers and mortgagees, unless the mortgage, or a true copy thereof, shall be immediately filed in the office of the register of deeds in the county where the property is at the time of its execution; if the mortgagor be a resident of the State, then of the county of which he shall be a resident. Such mortgage, as to third persons, shall be void at the expiration of one year after same is filed,

¹ Laws of 1886, ch. 117.

² Code, § 1922.

unless within thirty days next preceding the expiration of said year, and each succeeding year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time, and the amount yet due thereon. Such affidavit shall be attached and filed with the original mortgage.¹

§ 298. **Exempt Property.**—A chattel mortgage of exempt property must be signed by husband and wife jointly.²

§ 299. **Conditional Sales.**—Any and all instruments in writing, or promissory notes now in existence or hereafter executed, evidencing the conditional sale of personal property, and that retain the title to the same in the vendor until the purchase-price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept, and, when so deposited, shall be subject to the law applicable to the filing of chattel mortgages, and any conditional verbal sale of personal property, reserving to the vendor any title in the property sold, shall be void as to creditors and innocent purchasers for value.³

§ 300. **Instance.**—The renewal affidavit may be filed any time if no purchase or lien in good faith has intervened, or the mortgagee, after the year, and without affidavit, may secure himself by taking possession.⁴

§ 301. **Kentucky.**—Chattel mortgages may be given on personal property, and the possession remain with the mortgagor, if duly acknowledged and recorded in the clerk's office of the county in which the property is situated, or the

¹Acts of 1889, § 3904 *et seq.*; Doss. Com. Laws, §§ 3499, 3501; Mort. Act, § 9 *et seq.*

In absence of stipulations to the contrary, the mortgagee of personalty has the legal title thereto, and right of possession. Mort. Act, § 15.

²Laws of 1889, ch. 176.

³Laws of 1889, ch. 255.

⁴Dayton v. People's Saving Bank, 23 Kans. 421.

greater part thereof. Such instruments take effect from the time of acknowledgment and recording.

They are barred by five years' possession. Except as to purchasers having actual notice, all mortgages take effect only from the time they are lodged for record in the county clerk's office.¹

Mortgages of stock in trade are good against all persons as to existing stock, and good between the parties as to future additions.

No statutory provisions exist as to conditional sales of personal property, and the common law governs.

§ 302. **Louisiana.**—Chattel mortgages are unknown to the laws of this State, except as to ships. Chattel mortgages made in other States will not be enforced in this State by comity.

But all movables, whether corporeal or incorporeal, may be pledged or pawned. As against third persons the pawn must be an act before a notary, or under private signature. Promissory notes, bills of exchange, stocks, obligations or claims upon other persons may be pledged by simple delivery to the creditor, if made *bona fide*. All pledges of movables must be accompanied by actual delivery, either to the pledgee or some third person chosen by the parties. Delivery of property on deposit in a warehouse shall pass by private assignment of warehouse receipts, and be valid without further formalities.²

Conditional sales are not binding on third parties. One of the privileges of the vendor is the vendors' lien, or the price due on movables, if they are yet in the possession of the purchaser.

§ 303. **Maine.**—Possession remaining with the mortgagor, the chattel mortgage must be recorded in the town clerk's office where the mortgagor resides. If the mortgagor is a non-resident, then it must be recorded where the property is

¹ Gen. Stat. ch. 24, §§ 9-11.

² Rev. Code, § 3289. See *Delop v. Windsor*, 26 La. Ann. 185.

when the mortgage is executed, or if made by a corporation, it must be recorded where its place of business is. No renewal is necessary. The mortgagor has no right to retain possession of the property, unless so stipulated in the mortgage. Notes are also given for property, stipulating that it shall remain the property of the payee until the notes are paid, and are subject to the same regulation as to record as mortgages.¹

No renewal is required.

The notes may be written without foreclosure, and in this they differ from chattel mortgages.

Contracts of bottomry, *respondentia*, transfer, assignment or transfer of a vessel or goods at sea or abroad, do not come under these recording laws, if possession is taken as soon as may be after the arrival.²

No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid, is valid, unless it is made and signed as a part of the note, and then no such agreement is valid, except between the parties, unless recorded like chattel mortgages.³

The following instrument—"Milford, April 8, 1887. Cunningham and Madden, let W. Marshall have one bay horse eight years old, known as the Cunningham horse, for one hundred and fifty dollars. Fifty dollars by the 15th of April, 1887, and one hundred dollars by the first of August; that said Cunningham and Madden should hold the horse until paid for. Wm. H. Marshall"—is a note with an agreement that the property bargained and delivered shall remain the property of the payee until the note is paid, and is not valid, except as between the original parties to the agreement, unless it is recorded like mortgages of personal property.⁴

¹ Rev. Stat. ch. 111, § 5; ch. 91, §§ 1-7.

² Rev. Stat. ch. 91, § 6.

³ Rev. Stat. ch. 111, § 5.

⁴ *Cunningham v. Trevitt*, 82 Me. 145.

The following instrument—"Newfield, August 30, 1886. I agree to let Joseph W. Nutter have two tons English hay at \$14 per ton delivered, and two tons of run hay at \$7 per ton delivered, and pay him \$10 per month for three months to come, September, October and November, and \$5 per month until I pay him \$125 and interest for a black mare that he lets me have, and said mare is to remain said Nutter's until she is paid for. George Smith"—is an instrument that should be recorded. It contains a "note" given for personal property bargained and delivered within the meaning of the statute.¹ And a promissory note containing a stipulation that the personal property for which it is given shall remain the property of the payee until the note is paid (or a "Holmes note"), is so much of the nature of a chattel mortgage that the holder cannot maintain an action of replevin against an attaching creditor until he has given to the creditor, or the officer, forty-eight hours' notice, in writing, of his claim and its amount, as required by Rev. Stat. ch. 81, § 44.²

§ 304. **Maryland.**—Chattel mortgages and bills of sale must be recorded in the county or city where the mortgagor or vendor resides, within twenty days from their date. Mortgages are liens for twenty years. A like affidavit of consideration is required to chattel mortgages and bills of sale as is required to mortgages of real estate.

The affidavit must be made by the mortgagee or his agent, which must be indorsed on the mortgage and recorded therewith, "that the consideration in said mortgage is true and *bona fide* as therein set forth." This affidavit can be made before any one authorized to take acknowledgments of deeds.³

Personal property in possession of vendee, yet with conditions by which it remains property of vendor until the happening of some event, does not come within the Code

¹ Hill v. Nutter, 82 Me. 199.

² Monaghan v. Longfellow, 82 Me. 419. See 81 Me. 298.

³ Code of 1888, art. 21, § 45.

as to chattel mortgages and bills of sale, and is a valid transaction.¹

§ 305. **Massachusetts.**—Chattel mortgages need not be under seal or acknowledged. They must be recorded on the records of the city or town where the mortgagor resides when the mortgage is executed, and on the records of the city or town in which he, at the time, principally transacts his business. If the mortgagor be a non-resident, the mortgage must be recorded on the records of the city or town where the property is located at the time of executing the mortgage. It must be recorded within fifteen days from the date written in such mortgage, and if there are two places of record, under the provisions of the statute, then it must be recorded in the second place, within ten days after the first record, otherwise the mortgagee must take actual possession. Mortgages of vessels and goods at sea need not be so recorded.²

No record is necessary of a mortgage, contract of bottomry or *respondentia* of a ship, nor of the transfer of goods at sea or abroad, if the mortgagee takes possession of such goods as soon as may be after their arrival in the State.³

Personal property sold on condition that the title shall not pass until the price is paid, may be redeemed by the vendee within fifteen days after being taken by vendor for breach of condition, by paying to the vendor the full amount of the price then unpaid, together with interest and all lawful charges and expenses due him.⁴

Sale or concealment of such property by the vendee before performance of condition, with intent to defraud, is punishable by fine and imprisonment.⁵

If the property be furniture or other personal effects, the contract, whether in the form of a lease or otherwise, must

¹ Walsh v. Taylor, 39 Md. 592.

² Stat. of 1883, ch. 73.

³ Pub. Stat. ch. 192.

⁴ Pub. Stat. ch. 192.

⁵ Pub. Stat. ch. 203.

be in writing and a copy furnished by the vendor to the vendee at the time of sale, and all payments and charges, whether for interest or otherwise, must be indorsed thereon, at the request of the vendee, and the fifteen days provided for redemption do not begin to run until an itemized statement of the amount due the vendor at the time of taking possession for breach of condition has been furnished to the vendee.¹

§ 306. **Michigan.**—Every chattel mortgage, or conveyance intended to operate as a mortgage of chattels, when the mortgagor retains possession of the mortgaged property, shall be absolutely void as against creditors and subsequent purchasers and mortgagees, unless the mortgage or a copy thereof shall be filed in the office of the township clerk of the township, or city clerk of the city where the mortgagor resides. When the mortgagor is a non-resident, then the mortgage or a copy thereof shall be filed in the office of the clerk of the township or city where the property is at the time of the execution of the mortgage.

It must be renewed at the end of one year, to continue valid as to third parties. This is done by the mortgagee, or some one in his behalf, making an affidavit within thirty days next preceding the expiration of the year, which must be annexed to the copy on file, stating his interest in the mortgaged property. To preserve the lien, this must be done each year.²

§ 307. **Minnesota.**—When the mortgagor retains possession of the mortgaged property, the mortgage must be acknowledged before an officer authorized to take the acknowledgment of deeds, or a town clerk, and must be filed in the office of the town clerk where the property is situated, and a copy thereof also filed in the office of the town clerk where the mortgagor resides at the time of the execution of the mortgage. The mortgage ceases to be notice after two years

¹ Laws of 1884, ch. 313.

² Howell's Stat. ch. 234, § 6193.

As to conditional sales, see How. Stat. § 6190.

from date of filing. If the debt is not due, then if an affidavit of the mortgagee, his agent or attorney, setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property, is made and annexed to the mortgage or copy so on file, before the expiration of two years, it renews the mortgage one year, at the end of which time it can be renewed again.¹

§ 308. **Instance.**—When the mortgagor resides in an incorporated village in which the property is, then the mortgage, or copy thereof, must be filed in the office of the town clerk of the town in which the village is situated.²

§ 309. **Notes.**—Notes or other evidences of indebtedness or contract, whereby the title to the property for which the same were given remains in vendor, are absolutely void as against the creditors of the vendee, subsequent purchasers and mortgagees in good faith, unless the same, or a copy thereof, or, if a contract be oral, then a memorandum thereof, be filed in the office of the town clerk (or, in the several cities and villages, in the office where the records are kept) of the town, city or village where vendee lives at the time of making the contract. Such filing is notice of the conditions of sale to all parties interested, but ceases to be notice as against creditors of the vendee and subsequent purchasers and mortgagees in good faith, after the expiration of one year from the day on which such indebtedness is due. When such indebtedness is paid, the vendor shall deliver to the vendee a certificate of satisfaction under his hand for filing in said clerk's office, upon which filing the clerk will deliver up the original instrument.³

A seed-grain note, in order to be valid as a lien, must come within the statute and be duly filed. But if the note is not given for seed from which the grain was raised, and the maker was furnished no seed grain, no lien is

¹ Laws of 1887, p. 110.

² *Moriarty v. Gullickson*, 22 Minn. 39.

³ Laws of 1883, ch. 38; Laws of 1885, ch. 76; Gen. Stat. of 1878, ch. 39, §§ 15-20.

created under the statute.¹ No lien is created by an instrument purporting to be a seed-grain note, where the terms of the statute are not in fact complied with, and where the crop upon which the lien is claimed is not grown from the seed actually furnished by the party receiving such note.²

A chattel mortgage on crops to be thereafter sown and raised on the land of the mortgagor, constitutes no lien on the land, and will attach only to such interests as the mortgagor has in the crops when they grow into being.³

§ 310. **Mississippi.**—Chattel mortgages must be recorded in the office of the clerk of the Chancery Court for the county wherein the property is. Unless so recorded, the conveyance is voidable by any subsequent *bona fide* purchaser, or any creditor. The record cannot be made unless the deed or other writing is either acknowledged or attested by subscribing witnesses, whose signatures, or that of the grantor, must be properly proven.

When the record is made, it gives constructive notice to all persons at the date of the filing for record.

If the property mortgaged be removed to another county, the mortgagee may protect himself against third persons by recording the mortgage in such county within twelve months from the time of the removal.

Mortgages and deeds of trust are lawful on growing crops, and crops to be grown in fifteen months, if the mortgagor has potential interest in the land on which the crop is grown.

All deeds of trust and mortgages whatsoever, title bonds and other written contracts in relation to lands, must be recorded, and unless so recorded, are voidable by any subsequent *bona fide* purchaser or creditor of the grantor.⁴

¹ Kelly v. Seely, 27 Minn. 385.

² Wallace v. Palmer, 36 Minn. 126; followed in Smith v. Roberts, 43 Minn. 342.

³ Simmons v. Anderson (Minn.), 47 N. W. Rep. 52.

⁴ Rev. Code of 1880, §§ 1210, 1216, 1359.

No mortgage conveying the income or future earnings of any corporation, or the rolling-stock of a railroad, is valid against debts contracted in carrying on the business of the corporation, nor against liabilities incurred by railroad companies as carriers of freight or passengers, or for damages sustained to persons or property, except as against claims in excess of \$5,000 for damages to any person. Code, § 1033.

§ 311. **Missouri.**—Chattel mortgages and deeds of trust upon personal property are void as to creditors of the grantor and subsequent purchasers without notice, unless the mortgagee or beneficiary receives and retains possession of the property, or the mortgage or trust deed must be recorded in the county where the grantor resides. No special limitation as to when a chattel mortgage shall be foreclosed exists. The mortgage or deed of trust must be acknowledged or proved in such manner as conveyances of land are.¹

These provisions do not apply to a contract of bottomry, *respondentia*, nor any transfer, or assignment, or hypothecation of any boat, vessel, ship, or goods at sea or abroad, if the mortgagee, trustee or *cestui que trust* shall take possession of such property as soon as may be after its arrival in the State.

Conditional sales of personal property must be evidenced by writing, executed, acknowledged and recorded as in case of mortgages, otherwise the condition is voidable as to subsequent purchasers in good faith and creditors. Vendor, to recover such property, must tender amount paid by purchaser, less reasonable compensation for use of property, not exceeding twenty-five per cent. of amount so paid, and actual damage to property.²

§ 312. **Montana.**—No chattel mortgage is valid as against any third person unless the possession of the property is delivered to and retained by the mortgagee; or the mortgage provides that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto; or in case a party is absent, the affidavit of those present, and of the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, and be acknowledged in manner provided for the acknowledgment of deeds for real property, and filed, together with the affidavit, in the office of the recorder of

¹ Wag. Stat. of 1872, ch. 35, §§ 8, 9.

² 2 Rev. Stat. §§ 5180, 5181.

deeds of the county where the mortgagor resides, or, in case he is a non-resident of the State, then in the office of the recorder of deeds of the county where the mortgaged property may be at the time of the execution of the mortgage. A copy may be filed of the original, if it is certified to be correct by the recorder, or the person before whom the acknowledgment has been made.

It is valid as against creditors and subsequent purchasers, from the time it is filed, until the maturity of the whole debt, and a period of twenty days thereafter, provided the whole time shall not exceed one year. The mortgage may be renewed by filing an affidavit showing the date of such mortgage, the names of the mortgagor and the mortgagee, the date of filing the same, the amount of the debt or obligation secured thereby and the amount of the debt justly owing at the time of the filing of such affidavit, or the condition of the obligation unfulfilled, the time to which the same is extended, which should not exceed one year, and that such debt or obligation was neither made nor renewed, or extended to hinder, delay or defraud the creditors or subsequent mortgagees of the mortgagor. The affidavit must be filed in the office where the mortgage is filed, and is attached thereto by the recorder and noted in the index.

Any subsequent mortgagee of this property may, at any time during the existence of such mortgage, pay the amount of the debt and interest, as shown by the mortgage or renewal affidavit, or deposit the full amount thereof with the recorder of deeds where the mortgage is filed, subject to the order of the mortgagee, and the subsequent mortgagee will be subrogated to all the rights of the first mortgagee.

A chattel mortgage shall be construed to include bills of sale, deeds of trust, and other conveyances of goods and chattels or personal property, and shall have the effect of a mortgage or lien on such property.¹

§ 313. **Nebraska.**—Chattel mortgages are void against cred-

¹ Statute of 1881, §§ 1-7; Act of March 5th, 1887.

itors of the mortgagor, subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed in the office of the clerk of the county where the mortgagor resides, or, if he is a non-resident, in the county where the property is at the time of the execution of the mortgage, unless there is immediate delivery followed by an actual and continued change of possession of the property mortgaged. Mortgages need not be acknowledged. The mortgage ceases to be valid as against a creditor of the mortgagor, subsequent purchasers or mortgagees in good faith, after five years from date of filing, unless re-executed and refiled. Sale or mortgage or assignment, upon any condition, of chattels, unless accompanied by delivery and followed by actual and continued possession, is *prima facie* fraudulent and void as against creditors and subsequent purchasers and mortgagees in good faith.¹

A bill of sale in the nature of a chattel mortgage is good, as to the parties to it, without being filed. Every chattel mortgage containing power of sale to mortgagee may be foreclosed by sale without proceedings in court.²

Sale or mortgage of chattels, unless followed by actual and continued change of possession, is *prima facie* fraudulent and void as against creditors of the mortgagor and subsequent *bona fide* purchasers.³

No sale, contract or lease, wherein the transfer of title to personal property is made to depend upon any condition, shall be valid against creditors or subsequent purchasers of the vendee in actual possession unless it be in writing, signed by the vendee, or an affidavit of the vendor, his agent or attorney, setting forth the names of both parties, a description of the property transferred, and the full and true interest of the vendor or lessor therein.

§ 314. Nevada.—Where the mortgagor retains possession, the mortgage must be recorded in the office of the county

¹ Com. Laws, p. 288, §§ 14, 16.

² Com. Laws, pp. 82, 83, §§ 1-9.

³ Com. Laws, p. 287, § 11.

recorder of the county where the property is situate, and also in the county where the mortgagor resides.

A mortgage upon personal property, including growing crops, executed, acknowledged and recorded, shall be valid against third parties without delivery of possession to the mortgagee, provided that no such mortgage shall be valid for any purpose as against third parties unless there be appended or annexed thereto the affidavit of the mortgagor and mortgagee, or some person in their behalf, setting forth that the mortgage is made in good faith, and given for a debt actually owing from the mortgagor, stating the amount and character of such debt, and that the same is not made or received with intent to hinder, delay or defraud any creditor of the mortgagor, provided that a chattel mortgage upon a growing crop may be executed as well before as after the crop is planted; and when executed before the crop is planted, it shall be expressed in the mortgage that it is the intention of the parties that the same shall take effect upon the crops when planted, provided that no chattel mortgage shall be given or be valid for a less sum than \$100.

The lien exists one year. It can be renewed within thirty days next preceding the expiration of the year, by recording an affidavit made by the mortgagee showing the sum still due.

This act does not apply to contracts of bottomry, *respondentia*, or assignments or hypothecation of vessels or goods at sea, or in foreign States, or without the State, provided the assignee or mortgagee takes possession of such goods as soon as may be after the arrival thereof within the State.¹

Mortgaged property may be seized under execution or attachment against mortgagor, and surplus over mortgage debt applied to payment of judgment against mortgagor; but the possession thereof shall not be taken from mortgagor or mortgagee, unless full payment of the mortgage debt be first made, which, if done by the attaching creditor of the

¹ Com. Laws, tit. "Chattel Mortgages."

mortgagor, shall entitle him to hold such personal property and the possession thereof under his levy, for payment to him of the amount so paid to the mortgagee, with interest as provided in the mortgage, in addition to his own individual demand. If the debt is not paid to the mortgagee, the officer may sell the property, subject to the rights of the mortgagee under the mortgage, and the purchaser shall take such property subject to such right and to the possession of the parties to the mortgage.¹

No statutory provisions concerning conditional sales have been enacted, but such sales are sustained by the courts.

§ 315. **New Hampshire.**—Personal property and crops, growing or matured, may be mortgaged. If the mortgagor retains possession the mortgage must be recorded in the office of the clerk of the town where the mortgagor resides. No chattel mortgage is valid, save as between the parties thereto, unless the statute is complied with, nor unless both of the parties subscribe and make oath to the following affidavit, which must be made upon the mortgage and recorded therewith :

“ We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt, honestly due and owing from the mortgagor to the mortgagee. So help us God.”

When a firm is a party, any partner may make the oath, and when a corporation is a party, any director or authorized agent may make the oath. If the mortgage is given for any other purpose than to secure a debt from the mortgagor to the mortgagee, the agreement or liability must be specifically stated in the mortgage, and the affidavit made to conform to it.²

¹ Com. Laws, tit. “Attachment.”

² Gen. Laws 1878, ch. 137, §§ 2-5; Gen. Laws, 328, 329.

No lien for personal property sold conditionally and passing into the possession of the conditional vendee, shall be valid against attaching creditors, or subsequent purchasers without notice, unless the vendor of such property takes a written instrument signed by the vendee, witnessing such lien and the sum due thereon, and causes it to be recorded in the town clerk's office of the town where the purchaser of such property resides, if he resides in the State, otherwise in the town clerk's office of the town where the vendor resides, within ten days after such property is delivered. Such vendor and vendee shall make and subscribe an affidavit, in substance as follows :

"We severally swear that the foregoing memorandum is made for the purpose of witnessing the lien and the sum due thereon, as specified in said memorandum, and for no other purpose whatever ; and that the said lien and the sum due thereon are not created for the purpose of enabling the purchaser to execute said memorandum ; but said lien is a just lien, and the sum stated to be due thereon is honestly due thereon, and owing from the purchaser to the vendor."

When copartners are parties to such a memorandum, or when a corporation is a party thereto, the affidavit may be made and subscribed as is by law provided that the affidavit required in the case of chattel mortgages may be made and subscribed.

§ 316. *New Jersey.*—Every mortgage of goods and chattels, or conveyance intended to operate as such, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, is absolutely void, as against the mortgagor's creditors and subsequent *bona fide* purchasers and mortgagees, unless the mortgage be recorded in the office of the clerk of the county wherein the mortgagor, if a resident of the State, resides at the time of the execution of the mortgage ; and, if a non-resident of the State, then in the office of the clerk of the county where the mortgaged property is at the time of such execution ; but if, in such county, there

be a register of deeds, such mortgage must be recorded in such register's office. Every chattel mortgage or conveyance intended to operate as such, must, before it is recorded, be acknowledged or proved, and such acknowledgment or proof certified thereon in the same manner as in the case of deeds of real estate. There must be annexed, before recording, to such mortgage or conveyance, an affidavit or affirmation made and subscribed by the mortgagee or holder thereof, or his agent or attorney, stating the consideration of the mortgage, and, as nearly as possible, the amount due and to grow due thereon. Any chattel mortgage so made, executed and recorded, will remain, from the time of such record, valid against such creditors and subsequent purchasers and mortgagees, until it be canceled of record.

Every chattel mortgage vests in the mortgagee or holder of it the right to the possession of the chattels therein described, so far as may be necessary to prevent the removal of such chattels out of the county wherein they lay at the time of the execution of such mortgage, and of recovering such chattels in case they have been so removed. This provision does not, however, apply to any vessel, rolling-stock of railroads, or to any chattels which, in the ordinary use of them, at the time of the execution of the mortgage, are taken from time to time out of the county wherein they lay when mortgaged.¹

In every contract for the conditional sale of goods and chattels, made after July 4th, 1889, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until such goods or chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as

¹ Laws of 1881, p. 226; Laws of 1885, ch. 244; Laws of 1878, p. 139; Sup. Rev. Stat., tit. "Mortgages."

against subsequent purchasers and mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract for sale, with such conditions and reservations therein, be recorded in the clerk's office or register's office, if there be one, of the county wherein the party contracting to buy, if a resident of New Jersey, shall reside at the time of the execution thereof, and if a non-resident, then in the clerk's office or register's office, as the case may be, of the county where the property so conditionally bought shall be at the time of the execution of such instrument.

No contract of sale, or conveyance intended to operate as a contract to sell goods and chattels conditionally, can be recorded, unless the execution thereof be first acknowledged or proved, and such acknowledgment or proof certified thereon, in the manner prescribed by law for the acknowledgment and proof of deeds of conveyances of real estate. Every contract of sale recorded as above shall be valid against creditors of the person contracting to buy, and against subsequent purchasers and mortgagees, from the time of recording it.¹

A chattel mortgage given to secure an accommodation indorser of a promissory note against liability on his indorsement is good, and inures, at the maturity of the note, to the benefit of the holder. The affidavit, then, should state that the amount due on the mortgage is the amount of the note. When the transaction is specifically set out in the body of the mortgage an affidavit at the foot of the mortgage, which, by special reference to the statement in the mortgage, clearly states the transaction, is sufficient, under the statute. The affidavit and mortgage may be read together.²

§ 317. **New Mexico.**—Chattel mortgages must be acknowledged and executed as mortgages on real estate. They must be accompanied by an immediate delivery and actual and continued change of possession, or they are void as against creditors

¹Laws of 1889, p. 421.

²*Tompkins v. Crosby*, 19 Atl. Rep. 720. See, also, *Gilbert v. Vail*, 60 Vt. 261; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396.

and subsequent purchasers and mortgagees, unless they, or a copy thereof, be deposited forthwith in the office of the recorder—probate clerk—of the county where the mortgaged property is then situate. A chattel mortgage is void as to third persons after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of one year, and each year thereafter, the mortgagee, his agent or attorney, shall make and file with such mortgage an affidavit showing the interest of the mortgagee in the property at the time of such filing; and if such mortgage is to secure the payment of money, the amount remaining due.

Growing crops cannot be mortgaged.¹

§ 318. **New York.**—Immediate delivery of the mortgaged property, with continued possession, must accompany the mortgage, otherwise it is void as against creditors and innocent third parties, unless it, or a true copy thereof, be filed in the office of the town clerk where the mortgagor resides, or if he be a non-resident, then in the town where the property is when the mortgage was executed.

In the city of New York such instrument shall be filed in the office of the register of said city. In the several cities of the State, other than New York city, and in the several towns in the State, in which a county clerk's office is kept, in such office, and in the other towns, in the office of the town clerk.

Such mortgage ceases to be valid after one year, as against others than the mortgagor and his representatives, unless a copy thereof is filed, with a statement of the amount due at the date of refiling, within thirty days next preceding the expiration of each and every term of one year. Chattel mortgages need not be under seal.²

§ 319. **Canal Boats.**—Any party having a lien on any canal boat, steam tug, scow, or other craft navigating the canals of the State, attaching under a chattel mortgage, shall file the same, or a true copy thereof, in the office of the

¹ Gen. Laws of 1880, pp. 63-65.

² Laws of 1833, ch. 279, § 1; Laws of 1873, ch. 501; Laws of 1879, ch. 418.

auditor of the canal department, provided the mortgagor does not give immediate and continued possession to the mortgagee. This is renewed like other chattel mortgages—by filing the copy with the said auditor.

The record of any bill of sale, mortgage, hypothecation or conveyance of any vessel of the United States, duly recorded in the office of the collector of customs where such vessels are enrolled, or a transcript or copy thereof, duly certified by said collector, may be read in evidence in any of the courts of the State, with the like force and effect as the original bill of sale, mortgage, hypothecation or conveyance, provided that the execution of such instrument shall, before having been so recorded, have been acknowledged by the party executing the same, or proved by a subscribing witness.¹

§ 320. **Conditional Sales.**—In every contract for the conditional sale of personal property, accompanied by immediate delivery and followed by actual and continued change of possession, all conditions and reservations providing that ownership of goods and chattels is to remain in vendor or other person than vendee until said chattels are paid for, or until the occurrence of a future event or contingency, are absolutely void as against subsequent purchasers and mortgagees in good faith, and as to them sales are deemed absolute, unless the contract for sale with said creditors and reservations, or a true copy thereof, is filed in the several towns and cities where vendee resides at the time of the execution of such contract, or if not a resident of the State, in the town or city where the property is at the time. In the city of New York and in the county of Kings, such instrument must be filed in the register's office; in other cities and towns where there is a county clerk's office, in such office; and in other towns, in the office of the town clerk.

If the conditional vendee is a railroad corporation, the instrument mentioned must be filed in the office of the clerk of each county in which the railroad is located, or in coun-

¹ Rev. Stat. of 1875, p. 789, §§ 36-38; p. 660, § 44.

ties where there is a register, in the office of the register. Said conditions and reservations cease to be valid against subsequent purchasers and mortgagees in good faith, after the expiration of one year from filing such instrument; and as to them sales are deemed absolute unless within thirty days next preceding the expiration of one year after the filing of a true copy of such instrument, together with a statement showing the interest of persons so contracting to sell such property, the contract for sale, or a true copy thereof, shall be again filed in the office of the clerks and registers as aforesaid.

These provisions do not apply to the sale of household goods, pianos, organs, scales, engines and boilers, portable saw-mills and saw machines, threshing machines and horse powers, mowing machines, reapers and harvesters, and grain drills, with their attachments, provided that the contract for the sale of the same be executed in duplicate, one duplicate being delivered to the purchaser. In case any of the specified articles are sold upon condition that title shall remain in vendor, or any person other than the purchaser, until payment of purchase price, or until the occurring of a future event or contingency, and the same is retaken by the vendor or his successor in interest, such property so retaken shall be retained for thirty days by the person by whom or in whose behalf the same has been so taken, during which time the purchaser or his successor in interest may fulfill such contract or purchase, and shall be entitled thereupon to receive such property. After the expiration of such time all the interest of the purchaser, or of his successor in interest, in such property lawfully retaken under such contract, shall cease.

These provisions do not apply to railroad equipments or rolling-stock sold, leased or loaned under a contract recorded pursuant to Laws of 1883, ch. 383.¹

¹ Laws of 1884, ch. 315; Laws of 1885, ch. 488; Laws of 1888, ch. 225.

There is a distinction between conditional sale and conditional delivery. Sales on the installment plan generally come under conditional sales.

A vendee of personal property sold upon the express condition that title shall not pass until the purchase price is fully paid, although in possession, cannot give title to *bona fide* purchaser. *Ballard v. Burgett*, 40 N. Y. 314.

§ 321. **North Carolina.**—Chattel mortgages and conditional sales of personal property are invalid as against third persons, unless such instruments are registered in the county where the mortgagor resides, or, if the mortgagor be a non-resident, then in the county where the chattels are situated, unless they consist of choses in action, in which latter case the mortgage must be recorded in the county where the mortgagee resides. No statute provides for their renewal.¹

§ 322. **Form.**—A form is prescribed by statute for chattel mortgages not exceeding \$300, the probate and registration fees on which are less than on ordinary chattel mortgages.²

§ 322a. **North Dakota.**—A mortgage of personal property must be created, renewed or executed by a writing subscribed by the mortgagor in the presence of two persons, who must sign as witnesses, and no further proof or acknowledgment is required. It is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers, unless it is filed by depositing the original, or an authenticated copy thereof, in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at the time of execution of the instrument. It ceases to be valid against creditors and subsequent purchasers and mortgagees after the expiration of three years from the filing thereof, unless within thirty days next preceding the expiration of such term, a copy of the mortgage and a statement of the amount of the existing debt for which the mortgagee or his assigns claim a lien, sworn to and subscribed by him, his agent or attorney, are filed anew. This renews for three years.³

§ 323. **Ohio.**—To be valid, when the mortgagor retains possession of the property mortgaged, or other conveyance

If, after sale, delivery is made upon condition that it shall not become complete until purchase price is paid, the purchaser may, nevertheless, pass title to a *bona fide* transferee. *Comer v. Cunningham*, 77 N. Y. 391.

¹ Code, §§ 1254, 1274, 1275.

² Code, §§ 1273, 1274.

³ Civil Code, §§ 1742-1755.

intended to operate as a chattel mortgage of goods and chattels, the mortgage, or a true copy thereof, shall be deposited with the clerk of the township where the mortgagor resides, or, if he is a non-resident, then with the clerk of the township where the property is at the time of the execution of the mortgage. Before filing, the mortgagee, his agent or attorney, must enter thereon a verified statement under oath, in dollars and cents, of the amount of his claim, and that it is just and unpaid. If the mortgage is given to indemnify the mortgagee against liability as surety for the mortgagor, such sworn statement shall set forth such liability, and that the instrument was taken in good faith to indemnify against loss that may result therefrom.

In townships where the office of the recorder of the county is kept the mortgage must be deposited with him; or, when the mortgagor resides in a township entirely merged in a city, or incorporated city, in which the office of county recorder is kept, or where the mortgagor is a non-resident of the State, and the property is within such township, the mortgage should be filed with the recorder.¹

Such mortgage is void at the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of the year, a true copy of such mortgage, together with a statement, verified as above stated, showing the interest of the mortgagee in the property at the time of such refiling, claimed by virtue of such mortgage, is again filed at the office where the original was filed.²

§ 324. **Instances.**—The year within which a refiling may be made begins to run from the exact date of the preceding year when the mortgage was first filed, and is computed at the corresponding day and hour of the following year.³

When a mortgage is executed by partners, where one lives in the county where the property is situate and the other in another county, upon property jointly owned by them, which

¹ Laws of 1883, p. 72.

² Rev. Stat. §§ 4150, 4155.

³ *Seaman v. Eager*, 16 Ohio St. 209.

is not accompanied by an immediate delivery and followed by an actual and continued change of possession, it is void as against an assignee for the benefit of creditors of such mortgagors, subsequently appointed, unless, pursuant to the statute, the mortgage, or a true copy thereof, be properly filed in the township where each of such mortgagors resides, notwithstanding the fact that such assignee had, at the time of the execution of the mortgage and of the assignment, full knowledge of the execution and filing of the mortgage in the township where one of the mortgagors resided, and where the goods and chattels were situate.¹

§ 324a. **Oklahoma Territory.**—Chattel mortgages need not be acknowledged; to be valid, as to third parties, there must be actual and continued change of possession of the property, and the original mortgage, or a true copy thereof, must be deposited in the office of the county clerk of the county where the mortgagor resides, if a resident of the Territory. Or, in case he is a non-resident of the Territory, then such mortgage or a copy must be deposited in the office of the county clerk of the county where the property is kept at the time of the execution of the mortgage. Such mortgage ceases to be valid as against creditors of the mortgagor, and subsequent purchasers and mortgagees in good faith, five years after filing of the same in the office of the county clerk.²

§ 325. **Oregon.**—Mortgages of chattels or a copy thereof must be immediately filed with the county clerk. Every such mortgage shall cease to be valid as against creditors, or subsequent purchasers or mortgagees, after the expiration of one year from the filing of the same, or a copy thereof, unless within thirty days next preceding the expiration of the year the mortgagee, his agent or attorney, shall make and annex to the instrument or copy on file as aforesaid an affidavit showing the interest which the mortgagee has by vir-

¹ *Westlake v. Westlake*, 24 N. E. Rep. 412; and see *Aultman v. Guy*, 41 Ohio St. 598.

² Gen. Laws, tit. "Mortgages."

tue of said mortgage in the property therein mentioned, upon which affidavit the clerk shall indorse the time when the same was filed.¹

It is a penal offense to execute a chattel mortgage upon chattels not owned by mortgagor, or to dispose of mortgaged goods without consent of mortgagee.²

There is no statute relating to conditional sales. Such sales, title to remain in vendor until chattels are paid for, vests no title in vendee, and his assignee has no claim on the property as against vendor.

Sewing machines, pianos, furniture and the like are sold on the installment plan, title to remain in vendor till purchase price is fully paid; and the lease expressing the agreement need not be recorded. Property so delivered to the purchaser may be followed into the hands of innocent third parties and recovered by the vendor. Conditional sales have been upheld by the Supreme Court.³

§ 326. **Pennsylvania.**—An act was passed April 27th, 1855, permitting lessees of collieries, manufactories and other premises to mortgage their leases, with the buildings, machinery, &c. Leases of mines, &c., in Schuylkill county might be mortgaged under act of April 5th, 1853. Both leases and mortgages must be recorded. An act was passed on May 18th, 1876, which was to be limited to five years, by which certain specified chattels might be mortgaged. By act of April 28th, 1887, chattel mortgages were authorized of not less than \$500 upon iron ore mined and prepared for use, pig iron, blooms and rolled or hammered iron, in sheets or bars, iron and steel nails, steel ingots and billets, rolled or hammered steel in sheets, bars or plates, and all steel and iron castings of every description not in place. Such mortgages are not to be valid, under certain circumstances, after three months from maturity. Except as to these provisions, chattel mortgages are not sanctioned in this State. They are

¹ Hill's Code, §§ 3053-3058.

² Code, §§ 1771-1777.

³ *Schneider v. Lee*, 17 Pac. Rep. 269.

considered as mere pledges, and are not valid as to creditors and subsequent purchasers or mortgagees, unless the property mortgaged is delivered to the mortgagee to take actual and continued possession, or what is equivalent thereto, at the time of the transaction.¹

§ 327. **Renewal.**—Under act of April 28th, 1887, the mortgage may be renewed within the said period of three months by the mortgagee or his duly-constituted agent.

The mortgagee shall make and sign a statement in writing, which he shall acknowledge, the statement specifying the amount due thereon, which statement shall be recorded in the office of the recorder wherein such mortgage was recorded, within the said period of three months, in which case the said mortgage shall continue for the amount due for a further period of one year from the maturity thereof.

On delivery of exclusive possession the vendor cannot retain a lien as against the vendee's creditors. In other cases the possession of the vendor should be such as not to deceive creditors of the vendee.²

§ 328. **Rhode Island.**—Chattel mortgages are invalid except between the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or the mortgage be recorded in the office of the town clerk where the mortgagor resides, if within the State, and if not, in the town where the property is at the time of the execution of the mortgage. In the city of Providence such mortgage must be recorded in the office of the recorder of deeds.³

The provisions for recording of chattel mortgages do not apply nor affect any transfer of property under bottomry or *respondentia* bonds, or of any ships or goods at sea or abroad, if the mortgagee takes possession as soon as may be after the arrival of the same in the State.

In the case of an ordinary chattel mortgage, in order to make it valid, one of three things must attend it, as against

¹ Bismark Building Association v. Bolster, 92 Pa. St. 123.

² Rowe v. Sharp, 51 Pa. St. 26.

³ Pub. Stat. ch. 176, § 9.

creditors and subsequent purchasers: It must be recorded at once, or the mortgagee must take possession, or third parties must have actual notice.

Conditional sales of personal property are not regulated by statutory provisions.

§ 329. **South Carolina.**—Chattel mortgages, when the possession of the chattels remains with the mortgagor, must be recorded within forty days from the time of their execution; personal property passes by mere delivery. Every agreement between vendor and vendee, bailor and bailee, of personal property, whereby the vendor or bailor shall reserve to himself an interest in the property, must be in writing and recorded as mortgages are, or be null and void as to creditors and subsequent purchasers.¹ All deeds of trust of personal property and chattel mortgages must be recorded in the county in which the grantor resides. The place of record in every county but Charleston is the office of the clerk of the Court of Common Pleas. In Charleston the proper office is that of register of mesne conveyances. Third persons without actual notice are not affected by deeds and mortgages, unless those instruments are recorded according to law. If the grantor be a non-resident, then the record must be made where the property is situated. If such instruments are recorded subsequent to the expiration of forty days, they shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without actual notice, only from the time of such record.²

Conditional sales of personalty are void as to third parties without actual notice, unless they are recorded in the same manner as mortgages and other deeds requiring recording.

§ 329a. **South Dakota.**—A chattel mortgage must be in writing and executed in the presence of two persons, who must sign as witnesses, and must be filed in the office of the register of deeds in the county where the property, or any part thereof, is situated at the time of the execution of the

¹ Laws of 1882, § 2346.

² Laws of 1876; 16 Stat. 92.

instrument. In order to give notice to creditors and to subsequent purchasers and incumbrancers, when witnessed no further acknowledgment is necessary to make it valid. It is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers in good faith, unless the original, or an authentic copy, is filed for record with the register of deeds in the county where the property, or any part thereof, is situated. The mortgage ceases to be valid at the expiration of three years, unless within thirty days next preceding the expiration of that time the holder or mortgagee makes a copy and sworn statement of the amount due thereon, and files the same.¹

§ 330. **Tennessee.**—Chattel mortgages are valid between the parties, without registration, but registration is necessary as against purchasers without actual notice, and, as to creditors, the mortgage must be registered, whether they have notice or not. The mortgagor may retain possession of the property if it be not consumable in its use. This does not apply to choses in action. Chattel mortgages must be registered in the county where the mortgagor resides, or, if a non-resident, in the county where the property is situated at the time of the execution of the mortgage.² These may be registered upon proper probate or acknowledgment of their execution. Registration without such probate or acknowledgment is without any virtue. Registration of such or acknowledgment is constructive notice to all persons.³

Parties may annex conditions to contracts for the sale of personal chattels, which will prevent the vesting of the title to the property, although actually delivered, until the performance of the condition. Where property is sold to be delivered in installments, or at intervals, to be paid for when the whole is delivered, the delivery does not pass the title until the condition is complied with.

When goods are sold with the privilege of returning same,

¹ Civil Code, §§ 1742-1755.

² Milliken & Ventrees' Code, §§ 2887, 2888.

³ Code of 1884, § 2309; Milliken & Ventrees' Code, §§ 2843, 2844.

they must be returned within a reasonable time or the sale becomes absolute. A contract for the rent of a sewing machine for so many months at a stated sum for the entire time, if this sum is paid within the time the machine is rented for, is in law a valid sale and not a renting. If a party sell and deliver personalty, but retain the title until the purchase-money is paid, it is a valid sale, and the vendor may follow the property into the hands of third parties and recover the same for the unpaid purchase-money.

§ 331. **Texas.**—Chattel mortgages or any instrument intended to operate as a lien upon personal property, not accompanied by immediate delivery and followed by actual change of possession, are void as against creditors, subsequent purchasers and lienholders, unless such instrument or a true copy thereof be forthwith deposited and filed in the office of the county clerk of the county where the property is situate, or, if the mortgagor be a resident, then in the county where he resides, the instrument so filed to remain in the office. If a copy, it must be compared by the clerk with the original, which in this case must be acknowledged as for record, and must be found a true copy.

Conditional sales of chattels, where the vendee takes possession, are treated as mortgages, and must be registered as against creditors and innocent purchasers.¹

§ 332. **Utah Territory.**—All kinds of personal property, except such as may be exempt from seizure and sale on execution, and that as security for the purchase-money, are subject to a chattel mortgage. No mortgage is valid, except as to the parties, unless possession of such property be delivered to and be retained by the mortgagee, or unless the mortgage provides that the property may remain in the possession of the mortgagor, and is accompanied by an affidavit of the parties thereto, or in case any party is absent, an affidavit of the parties present, and of the agent or attorney of such absent party, that the same is made in good faith to secure

¹ Rev. Stat. 1879, Append. p. 15, §§ 1, 2, 3, 7; § 4341; § 4332, note.

the amount therein named, and without any design to hinder or delay the creditors of the mortgagor. Every such mortgage shall be witnessed and acknowledged. Such mortgage, with the affidavit and acknowledgment, shall be filed and recorded in the office of the county recorder of the county where the mortgagor resides, or, if he be a non-resident, then in the county recorder's office of each and every county where the property may be at the execution of the instrument. Such mortgage is valid from the time of filing until the maturity of the debt secured, and for ninety days thereafter, provided the entire time shall not exceed one year.¹

§ 333. **Vermont.**—Chattel mortgages are allowed without change of possession, provided the mortgage be recorded in the office of the clerk of the town or city where the mortgagor resides at the time of making the mortgage, or, if he be a non-resident, then in the town where the property is situated, and provided that the mortgagor and mortgagee shall make and subscribe an affidavit as follows:

“We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that the same is a just debt, honestly due and owing from the mortgagor to the mortgagee.”

Which affidavit, with the certificate of the oath, signed by the authority administering the same, shall be made upon, or appended to, such mortgage, and be recorded therewith.

In case of a corporation, any director, cashier or treasurer thereof, or any person authorized, may make the affidavit.

If the mortgage be given to indemnify the mortgagee against any liability assumed or to secure the fulfillment of any agreement other than the payment of a debt due from the mortgagor, the affidavit must be made to conform to such

¹Gen. Laws of 1884, ch. 21, §§ 1-5.

liability or agreement. No property shall be removed from the State except by the consent of the mortgagor and the mortgagee.¹

Machinery in a shop, mill, quarry, mine, printing office or factory may be mortgaged in the same manner as real property is mortgaged.²

There are no provisions for renewal of a chattel mortgage.

Liens reserved on property sold conditionally and passing into the possession of the vendee, are not valid against attaching creditors or subsequent purchasers without notice, unless witnessed by a memorandum signed by the vendee and stating the amount due thereon, recorded in the town clerk's office where the vendee resides, if in the State, or, if a non-resident, where the vendor resides, within thirty days after the property is delivered. Such lien may be discharged by entry upon the margin of the record thereof or by release of the lien recorded in the same office. The property cannot be removed from the State without the consent of the vendor or his assignee. The property must not be sold or concealed, with intent to defraud, and in violation of such provision the actor is punishable by fine. After thirty days from condition broken the vendor may cause the property to be sold and the proceeds applied in the manner provided for enforcing chattel mortgages.³

§ 334. *Virginia*.—There may be mortgages and deeds of trust upon goods or chattels. Such mortgages and deeds of trust shall be void as to subsequent purchasers for valuable consideration without notice and creditors, until and except from the time that they are duly admitted to record in the county or corporation wherein the property may be, and, although recorded in one county, they are not valid as to property being in another county. If the property be removed from the county or corporation, one year is allowed

¹ Rev. Laws, §§ 1965-1979; 1882, Nos. 69, 70; 1884, No. 107; 1886, No. 91.

² Rev. Laws, § 1980; 1886, No. 61.

³ Rev. Laws, §§ 1992, 4158; Laws of 1884, Nos. 93, 101.

for the recording in the county or corporation to which the property has been removed.¹

§ 335. **Conditional Sales—Rolling-Stock.**—Every sale or contract for the sale of goods or chattels, wherein the title is reserved until the same be paid for in whole or in part, or the transfer of the title is made to depend on any condition, and possession be delivered to the vendee, is void as to creditors of and purchasers for value without notice from such vendee, unless such sale or contract be evidenced by writing executed by the vendor, in which the said reservation or condition is expressed, and until and except from the time the said writing is duly admitted to record in the county or corporation in which said goods or chattels may be.

As to rolling-stock, cars, &c., of railroad companies, contracts concerning them are to be recorded in the county or corporation where the principal office of the company is located—if in Richmond city, in the Richmond Chancery Court; and each locomotive, car or other piece of rolling-stock is to be plainly and permanently marked with the name of the vendor on both sides thereof, followed by the word “owner.”²

§ 336. **Washington.**—Chattel mortgages must be acknowledged and recorded in the office of the county auditor in the county where the property is at the time of the execution of the mortgage, accompanied by the affidavit of the mortgagor that it is made in good faith and without design to hinder, delay or defraud creditors, and acknowledged and recorded with the mortgage. Where mortgaged property is removed from the county, it is, except as between the parties, exempt from the operation of the mortgage, unless, within thirty days, the mortgage be recorded in the county to which it is removed, or the mortgagee takes possession.

Mortgages are given upon the rolling-stock of railroad

¹ Code, §§ 2465, 2466, 2468.

The county and corporation courts are those in which wills and deeds are recorded. The clerk of the court, under the supervision of the judge, acts as recorder.

² Code of 1887, § 2462.

companies, all kinds of machinery, boats and vessels, growing crops, portable mills and all kinds of personal property. The wife must join when the property is exempt from execution.¹

Chattel mortgages are binding until six years after they become due, between the parties.²

A mortgage on any vessel or boat, or part of a vessel or boat, of over twenty tons burden, shall be recorded in the office of the collector of customs where such vessel is registered, and need not be recorded elsewhere.³

§ 337. **West Virginia.**—Chattel mortgages and deeds of trust are executed with the same formality as deeds of real estate. Chattel mortgages are seldom used. They are not required to be renewed. No statute nor decision exists about letting a mortgagor hold possession of the mortgaged property. Deeds of trust are generally used.

No specific time is given for the record of deeds, mortgages and contracts in writing relating to real or personal property. They are void as to creditors and subsequent purchasers until and from the date they are duly admitted to record in the county wherein the property embraced in such deed or contract may be. If any such personal property shall be removed from the county the instrument must be recorded in such other county within three months after such removal.⁴

Any sale of goods and chattels, reserving the title until the same are paid for, or otherwise, and possession is delivered to the vendee, the same shall be void as to creditors of and purchasers without notice from such vendee, unless notice of such reservation be recorded in the office of the clerk of the county court of the county where the property is, or in case said goods and chattels consist of engines, cars or other rolling-stock or equipment to be used in or about the opera-

¹ Rev. Code, §§ 1986-1998.

² Rev. Code, § 27.

³ Rev. Code, §§ 1988, 1999.

⁴ Code, ch. 76, §§ 1, 2.

tion of any railroad, unless such notice be recorded in the office of the secretary of state, for which he is entitled to receive a fee of \$5.¹

§ 338. **Wisconsin.**—No chattel mortgage is valid against third parties unless the possession of the mortgaged property be delivered to and remain with the mortgagee, or unless the mortgage, or a copy thereof, be filed in the office of the clerk of the town, city or village where the mortgagor resides, or, if he be a non-resident, then where the property may be at the time of the execution of the mortgage. Such mortgage ceases to be valid as against third persons after the expiration of two years from the filing of the same, unless, within thirty days next preceding the expiration of the two years, the mortgagee, his agent or attorney, shall make and annex to the mortgage on file an affidavit showing the interest which the mortgagee has by virtue of such mortgage, which extends the mortgage two years more.

No contract for the sale of personal property, by the terms of which the title is to remain in the vendor until paid for, and the possession in the vendee, shall be valid against any third person without notice, unless such contract shall be in writing, and the same, or a copy thereof, shall be filed in the office of the clerk of the town or city or village where the vendee resides, or, if he be a non-resident, then in the office of the clerk of the town, city or village where the property is at the time of making the contract.²

All mortgages, liens, bills of sale, or other written instruments, in any way affecting the ownership of any marked logs in any lumber district, which shall specify the marks placed upon said logs, and when they were cut, shall be recorded in the office of the lumber inspector in which said marks are recorded.³

Chattel mortgages upon exempt property shall not be

¹ Acts 1882, p. 310, amending § 3 of ch. 74 of Code.

² Rev. Stat. of 1878, ch. 105, §§ 2313–2318; subdiv. 10, § 832.

³ Rev. Stat. of 1878, ch. 84, § 1739.

valid unless the same be also signed by the wife of the mortgagor, and her signature witnessed by two witnesses.¹

All contracts for sale of furniture or other household goods, made on condition that the title to the property sold shall not pass until the price is paid in full, whether such contract be in form of a lease or otherwise, shall be in writing, and a copy thereof furnished to the vendee by the vendor at the time of such sale, and all payments made by or in behalf of the vendee, and all charges, as they accrue, shall be indorsed on such copy by the vendor, if the vendee so requests, and a continuous failure waives the condition of such sale. Such contract shall not be valid, except as to the parties thereto, unless duly subscribed and filed as a chattel mortgage, but the effect of such filing shall not extend for more than one year after the time fixed for the payment of the contract price and the performance of the other conditions of such sale.²

No contract for the sale of personal property, by the terms of which the title is to remain in the vendor, and the possession thereof in the vendee, until the purchase price is paid or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof, unless such contract shall be in writing, subscribed by the parties, and the same, or a copy thereof, shall be filed in the office of the clerk of the town, city or village where the vendee resides, or, if he shall be a non-resident, then in the office of the clerk of the town, city or village where the property may be at the time of making such contract; but the effect of such filing shall not extend for more than one year after the time fixed for the payment of the contract price or the performance of the other conditions of sale.³

§ 339. **Wyoming.**—Chattel mortgages must be executed and acknowledged in the same manner as conveyances of

¹ Laws of 1887, ch. 268, § 2313.

² Laws of 1889, ch. 518, § 2319b..

³ Rev. Stat. § 2317.

real estate; that is, a mortgage must be signed and sealed by the mortgagor, and proved as follows: If executed within the State, it shall be executed in the presence of one witness, who shall subscribe the same as such, and acknowledge it before any judge or clerk of a court of record, or before any clerk, justice of the peace or any notary public in the State; and the officer taking such acknowledgment shall indorse thereon the same under his hand and seal of office, if there be one.¹

If the mortgagor retains possession, the mortgage must be recorded in the office of the county clerk of the county where the property is situated; but if the mortgage be upon cattle, horses, mules, sheep or other live stock, the mortgage may be recorded in the county wherein the range, upon which such live stock is or shall be principally running or ranging, is located. Chattel mortgages are in force from and after the time of delivering the same to the clerk of record, and not before, as to creditors and subsequent purchasers or mortgagees in good faith, for valuable consideration and without notice. These are in force as against such third parties during the term for which they are given and for two months thereafter. A chattel mortgage can be renewed before the expiration of the two months, if the mortgagee files or causes to be filed an affidavit setting forth his claim to the debt or any part thereof, which affidavit continues the mortgage for the term of one year, and by succeeding affidavits the mortgage may be indefinitely continued in full force and effect.²

It is also lawful for any person, firm or corporation to mortgage, in accordance with and subject to the provisions of the Chattel Mortgage act, possessory claims to public lands, all buildings, fences, ranches and improvements thereon; all quartz, coal and other mining claims, and all such personal property as shall be fixed in its structure to the soil; all neat-cattle or herds of cattle, horses, mules, sheep or other live stock; and any or all other personal property

¹ Rev. Stat. pp. 77-82.

² Acts of 1882, ch. 11, § 2.

owned, occupied or in possession of such mortgagor at the time of making such mortgage, and also all personal property of like kind and character as that described in such mortgage, thereafter to be acquired, owned, occupied or possessed by such mortgagor.

It is also lawful for the insertion in the mortgage of a provision that the mortgagor may use, handle, operate, herd, manage and control the property mortgaged, and to market, sell and dispose of portions thereof as may be necessary in the course of business, or to preserve and care for the same, and replace such parts sold with other property of like kind and character, which shall be subject to the operation and effect of such mortgage; *provided, however*, that such permission shall not allow the mortgagor to retain and use the proceeds of any such sale or sales to his own use, but the same shall be applied in and toward the payment of the debt or obligation by such mortgage.¹

¹ Rev. Stat. §§ 70-91.

CHAPTER IX.

CONSTRUCTION OF THE STATUTORY LAWS
OF REGISTRATION.

ARTICLE I.—BETWEEN THE PARTIES.

340. In General.

§ 340. **In General.**—Between the parties to a mortgage the mortgage is valid without a change of possession of the property or registration of the instrument. As to third persons, registration is equivalent to a continued change of possession in most of the States. As between the parties, even a defective mortgage may be good.

Whenever a chattel mortgage has been given for a valuable consideration, between the parties it is valid and binding, whatever may be its effect as to third persons.¹ And in most States a chattel mortgage which has not been filed or recorded is valid against subsequent purchasers or mortgagees of the chattels with notice.

Even a conveyance by bill of sale, absolute on its face, without conditions or defeasance expressed, when it is understood by the parties to be security for a debt, is substantially a mortgage, and if not recorded the vendee may take possession of the property, which perfects his lien as against third persons who had no prior lien before he took posses-

¹ *Wilson v. Leslie*, 20 Ohio 161; *Jefferson v. Jeffries*, 30 Mo. 423; *Sawyer v. Turpin*, 91 U. S. 114; *Machette v. Wanless*, 2 Colo. 169; *Badger v. Batavia Man. Co.*, 70 Ill. 302; *Stewart v. Platt*, 101 U. S. 731; *Hackett v. Manlove*, 14 Cal. 85; *Hall v. Snowhill*, 2 Green (N. J.) 8; *Beeman v. Lawton*, 37 Me. 543; *Claggett v. Salmon*, 5 Gill & J. (Md.) 314; *Hudson v. Warner*, 2 Harr. & G. (Md.) 415; *Lemay v. Williams*, 32 Ark. 166; *Kilbourne v. Fay*, 29 Ohio St. 264; *Williamson v. N. J. Southern R. R. Co.*, 26 N. J. Eq. 398; *McTaggart v. Rose*, 14 Ind. 230; *Davis v. Ransom*, 26 Ill. 100; *Fuller v. Paige*, 26 Ill. 358; *Forest v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Ill. 478; *Griffin v. Wertz*, 2 Ill. App. 487; *Smith v. Moore*, 11 N. H. 55; *Fitzgerald v. Andrews*, 15 Nebr. 52.

sion. Thus, one who takes a bill of sale of merchandise from his debtor as a security for money loaned, and the debtor is allowed to sell portions of the property in the usual course of business as if he were owner thereof, may take possession of the merchandise in order to secure his debt, and such taking is legal. This bill not being recorded yet vests the complete title in the vendee, subject only to be defeated by the discharge of the debt, or by some intervening right acquired before the possession was taken.¹

Even if the mortgage be made in fraud of the mortgagor's creditors, yet it is good between the parties to it. And a mortgage of personalty without the affidavit required by law, is, in some States, valid against subsequent mortgagees having notice that the prior mortgage was made in good faith and for a valuable consideration. But if the creditor knows it to be given to defraud the creditors, then it does not serve as notice to him, and he may seize the property. And in those States where it is unlawful for the mortgagor to hold the possession and sell the goods, as to subsequent purchasers and mortgagees, if the mortgagee takes possession, it becomes valid, so as to protect the property from execution creditors not having made a levy, and against subsequent purchasers from the mortgagor.²

¹ *Mitchell v. Black*, 6 Gray (Mass.) 100; *Sawyer v. Turpin*, 91 U. S. 114.

² *Gooding v. Riley*, 50 N. H. 400; *Tremper v. Barton*, 18 Ohio 418; *Brown v. Webb*, 20 Ohio 389; *Douglass v. Vogeler*, 6 Fed. Rep. 53; *Coggeshall v. Potter*, 1 Holmes C. C. 75; *Miller v. Jones*, 15 Bank. Reg. 150. But see *Moore v. Young*, 4 Biss. C. C. 128; *Re Abram*, 14 Bank. Reg. 125; 3 N. Y. Weekly Dig. 111.

ARTICLE II.—REGISTRATION.

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§ 341. **Recording and Filing.**—In most of the States it is the law that recording or filing a chattel mortgage is equivalent to a continued possession in the mortgagee of the property mortgaged. The recording of a mortgage contemplated by the statute is meant as a substitute for possession of the property by the mortgagee, but was not meant to protect him from all illegal stipulations contained in the mortgage.

“The creditor must take care in making his contract that

it does not contain provisions of no advantage to him, but which benefit the debtor and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this and puts in the contract stipulations which have the effect to shield the property of his debtor so that creditors are delayed in collection of their debts, the court of equity will not lend its aid to enforce the contract.”¹

Some of the States do not make the filing of the mortgage legally equivalent to actual delivery and continued change of possession; it merely adds another to the grounds on which a mortgage of personal chattels shall be void.²

§ 342. *Necessity of.*—The Code³ of Georgia of 1871, provides that whenever any person conveys personal property by bill of sale to secure a debt, and takes a bond to reconvey upon payment of the debt, such conveyance need not be recorded and shall pass the title to such property to the vendee; such conveyance executed in 1881, as the law then stood, the property remaining in the vendor's possession, was not required to be recorded.⁴

An unrecorded mortgage of chattels may be enforced after the legal title has vested in the widow of the mortgagor, under Arkansas law, conferring on the widow the right to the estate of the husband, when less than \$300 in value.⁵

In Arkansas, if a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his

¹ *Robinson v. Elliott*, 22 Wall. 513, per Davis, J.; *Miller v. Whitson*, 40 Mo. 98; *Cotton v. Marsh*, 3 Wis. 221; *Forbes v. Parker*, 16 Pick. (Mass.) 462; *Harrington v. Brittan*, 23 Wis. 541; *Morrill v. Sanford*, 49 Me. 566; *Fromme v. Jones*, 13 Iowa 474; *Feurt v. Rowell*, 62 Mo. 524; *Benson v. Nunan*, 63 Cal. 550; *Bullock v. Williams*, 16 Pick. (Mass.) 33; *Hughes v. Cory*, 20 Iowa 399.

² *Wood v. Lowry*, 17 Wend. (N. Y.) 492; *Smith v. Acker*, 23 Wend. (N. Y.) 653; *Horton v. Williams*, 21 Minn. 187; *Marsh v. Burley*, 13 Nebr. 261.

³ Code, § 1969.

⁴ *Tift v. Dunn*, 80 Ga. 14.

⁵ *Wolff v. Perkins*, 51 Ark. 43.

title is good against everybody; if the mortgage was previously valid between the parties, although it be not recorded nor acknowledged.¹

An assignment of a lease of mortgaged property by a chattel mortgage to an assignee of the mortgage, with authority to collect the rents accruing under such lease, does not constitute such a change of possession as to dispense with filing and renewing the mortgage as required by statute, where the lessee is allowed to remain in actual possession of the mortgaged property. Thus, where the plaintiff stood in the position of assignee of the lessor of the property, with authority to collect rent, and also as assignee of the mortgage at the time a levy was made on the property, the mortgage under which he claimed not having been renewed as provided by the statute, the creditor levying on the property will hold it.

There was no actual and continued change of possession of the property mortgaged as to do away with the requirements of the statute for filing and renewing of the mortgage.²

Where doubt exists as to the fulfillment of the requirement of the statute, it must be solved in favor of the fore-closer or creditor against the mortgagee, because he has full power to protect himself fully and to prevent others from being deceived.³

§ 343. **Rights of the Administrator of the Mortgagor.**—The administrator of the mortgagor of an unrecorded mortgage is not a third person within the meaning of the statute, so as to enable him to withdraw possession of the mortgaged property from the mortgagee on condition broken. He has no better title than had his intestate.⁴

The administrator takes the personal property of the testator as his representative, and acquires no better title than he had.⁵

¹ *Garner v. Wright*, 52 Ark. 385.

² *Nat. Bank v. Summers*, 75 Mich. 107.

³ *Anderson v. Brenneman*, 44 Mich. 198.

⁴ *Griffin v. Wertz*, 2 Ill. App. 487.

⁵ *Choteau v. Jones*, 11 Ill. 300.

In an action against an administrator it appeared that the plaintiff or mortgagee held a promissory note executed by the intestate, and secured by a chattel mortgage on certain property. Under order of the court the administrator had sold the property free of such lien for the purpose of discharging the same; so far as general creditors were concerned, the estate was insolvent. It was decided that under the Indiana statute,¹ which provides that an administrator shall pay the debts of his intestate in proper order, as soon as he shall have money in his hands with which to pay the same, it was the duty of the administrator to pay the mortgagee's claim as soon as this property was sold.²

§ 344. **Taking Mortgage to Indemnify Estate.**—An administrator has the right, in Indiana, when his intestate has signed certain notes as surety, to take from the principal debtor, without order of court therefor, a chattel mortgage to indemnify the estate against loss on account of such notes.

In an action by an administrator who had possession of mortgaged goods, against a creditor of the principal debtor who has seized them on execution, and the officer executing the writ, his damages are sufficiently established by showing that the principal debtor is insolvent, and that the property not seized is insufficient to pay the claims allowed against the estate on account of such security debts.³

It is not necessary that the administrator should have first paid the debts in order to show damage to the estate.⁴

§ 345. **Whom He Represents.**—The administrator of a deceased mortgagor represents the creditors as well as the estate, and has the right to treat as void mortgages made in fraud of the rights of creditors, and may take possession of the property and sell the same, passing a good title to the purchaser.⁵

¹ Elliott's Supp. of 1889, § 401.

² Jewett v. Hurre, 121 Ind. 404.

³ Walling v. Lewis, 119 Ind. 496.

⁴ Reynolds v. Shirk, 98 Ind. 480; Catterlin v. Armstrong, 101 Ind. 258.

⁵ Hangen v. Hachemeister, 114 N. Y. 566.

§ 346. **Ohio Doctrine.**—In this State, where a chattel mortgage is declared void by the statute as against creditors of the mortgagor who dies insolvent and in possession of the property, such property becomes assets in the hands of the executor or administrator of the mortgagor, whose duty, as well as right, it is to defend his possession against the claim of the mortgagee, notwithstanding such mortgage was valid as against the mortgagor.¹

§ 347. **Administrator's Rights When Mortgage is Void as to Creditors.**—If a mortgage is void as to creditors, and would be so held in any action by them to subject the mortgaged property to the satisfaction of their claims, it is also void as to the executor or administrator of the mortgagor dying in possession of the property, and becomes assets for the payment of the general creditors.

Every sale or other transfer of chattels, made with intent to defraud creditors, though valid as between the parties to the transaction, is utterly void as to creditors, and, as a general rule, they may act just as though no attempt had been made to dispose of the property. When they have obtained a judgment and execution against the debtor they may seize and sell the goods in the same way as though no transfer had been made. So long as the debtor lives, a judgment and execution, or some other legal process against him, is, in general, the only means by which the creditors can test the validity of the sale; but this rule does not always hold good after the debtor is dead. It is also true, for the most part, that an executor or administrator can maintain only such claims as the testator or intestate might have successfully asserted in his life; but this rule may have exceptions. Where one, having sold personal property to defraud his creditors, dies in possession of it, leaving debts unpaid to the full extent of his estate, including the property sold, and subsequently the vendee takes and converts the whole to his use, the executor or administrator may, in behalf of the cred-

¹ *Kilbourn v. Fay*, 29 Ohio St. 264. But see *Gill v. Pinney*, 12 Ohio St. 38.

itors, treat the transfer and taking possession as absolutely void, and recover the amount against the vendee. It would appear, also, that the right of the administrator would be the same in this respect had the vendee taken and held possession during the vendor's life-time. The title of the administrator takes effect by relation from the death of the intestate. The personal representative of a fraudulent vendor, who remains in possession until the time of his death, can set up the fraud of his intestate.¹

§ 348. **Rights of Assignee in Bankruptcy.**—Except in case of attachment against the property of the bankrupt, within the prescribed time preceding the commencement of proceedings in bankruptcy, and except in case where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the weight of authority holds that the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt.² He takes it in the same plight and condition that the bankrupt held it.³

§ 349. **Contrary Doctrine.**—It has been decided that an unrecorded chattel mortgage, when the property is not in the possession of the mortgagee, is not valid against the assignee in bankruptcy; that the assignee is the representative and trustee for the general creditors, and may impeach

¹ *Babcock v. Booth*, 2 Hill (N. Y.) 181. See, also, the following, which hold the same doctrine: *Collins v. Myers* 16 Ohio 547; *Hanes v. Tiffany*, 25 Ohio St. 549; *Shears v. Rogers*, 3 Barn. & A. 362; *Doe v. Ball*, 11 M. & W. 531; *Bayard v. Hoffman*, 4 Johns. Ch. (N. Y.) 450; *Doe v. Backenstose*, 12 Wend. (N. Y.) 543; *Bates v. Jordan*, 1 Kern. (N. Y.) 237; *Shields v. Anderson*, 3 Leigh (Va.) 729; *Benjamin v. Le Baron*, 15 Ohio 517; *Goudy v. Gebhart*, 1 Ohio St. 262; *Curd v. Wunder*, 5 Ohio St. 92; *Chapman v. Weimer*, 4 Ohio St. 481; *Bloom v. Noggle*, 4 Ohio St. 45.

² *Yeatman v. Savings Institution*, 95 U. S. 764; *Brown v. Heathcote*, 1 Atk. 160; *Mitchell v. Winslow*, 2 Story C. C. 630; *Gibson v. Warden*, 14 Wall. (U. S.) 244; *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Donaldson v. Farwell*, 93 U. S. 631; *Jerome v. McCarter*, 94 U. S. 734; *Mitford v. Mitford*, 9 Ves. Jr. 87; *Stewart v. Platt*, 101 U. S. 731; *In re Griffith*, 1 Low. D. C. 431; *In re Dow*, 6 Bank. Reg. 10; *Coggeshall v. Potter*, 1 Holmes C. C. 75; *In re Wynn*, 4 Bank. Reg. 23; *Johnson v. Patterson*, 2 Woods C. C. 443; *Goddard v. Weaver*, 1 Woods C. C. 257; *In re Collins*, 12 Bank. Reg. 579.

³ *Winsor v. McLelland*, 2 Story C. C. 492.

the validity of a chattel mortgage, void by local statute as to creditors, because not recorded, and has all the rights in this respect that an attaching or execution creditor would have had, if bankruptcy proceedings had not supervened. The assignee in bankruptcy of the mortgagor stands in the position of judgment creditors or lien creditors with equal rights, the adjudication of bankruptcy being equivalent to the record of a judgment and levy.¹

§ 350. **Rights of an Assignee in an Assignment.**—The assignee takes the property under the assignment and holds it for the exclusive benefit of the creditors. A mortgage void as to creditors for want of proper execution, under the Ohio statute, is void as against an assignee in trust for the benefit of creditors.²

In Michigan an assignee cannot maintain replevin against a sheriff who has levied on the property under an execution against the mortgagor, while in the possession of the lessee, as the title is in the mortgagor, and the assignee stands only in the position of a mortgagee.³

§ 351. **As Against the Assignee in Insolvency.**—The assignee of a mortgage by an assignment of date earlier than the mortgagor's petition in insolvency, and the mortgagor's assignee for the benefit of creditors, stand in the same position as the original parties to the mortgage. The assignee for the benefit of creditors, therefore, cannot claim, as against the other assignee, goods substituted in the usual course of trade for those originally mortgaged; and which, as the mortgage stipulated, were to be covered by its lien.⁴

¹ *Re Werner*, 5 Dill. C. C. 119; *Mellier v. Jones*, 15 Bank. Reg. 150; *Re Gurney*, 15 Bank. Reg. 373; *Baker v. Smith*, 12 Bank. Reg. 474; *Re Leland*, 10 Blatchf. C. C. 503; *Carr v. Hilton*, 1 Cur. C. C. 390; *Harvey v. Crane*, 2 Biss. C. C. 496; *Robinson v. Elliott*, 22 Wall. (U. S.) 513; *In re Gurney*, 7 Biss. C. C. 414; *In re Eldridge*, 2 Biss. C. C. 362; *Platt v. Stewart*, 13 Blatchf. C. C. 481; *Bank v. Hunt*, 11 Wall. (U. S.) 391; *Goodrich v. Michael*, 3 Colo. 77; *Bingham v. Jordan*, 1 Allen (Mass.) 373; *Allen v. Massey*, 4 Bank. Reg. 248.

² *Hanes v. Tiffany*, 25 Ohio St. 549.

³ *National Bank v. Summers*, 75 Mich. 107.

⁴ *Williamson v. Nealey*, 81 Me. 447.

The assignee for the benefit of creditors has the same rights which the insolvent had and could assert at the time of his insolvency, except in case of fraud.¹

§ 352. **Sufficient Record.**—In legal contemplation, the filing of a mortgage is complete when delivered to, received by, and left with the recording officer for that purpose.²

In Nebraska, where a mortgage is duly filed in the county where the mortgagor resides, and is constructive notice there, it will be constructive notice into whatever county the mortgagor may remove with the property.³ But if the mortgagor gives a mortgage in a county where he is temporarily domiciled, and the mortgage is recorded there, it will be ineffectual as against his creditors. Thus, a foreign corporation, doing business in a certain county in Arkansas, executed a mortgage on personal property to secure certain notes, and the mortgage was duly recorded in said county. Subsequently certain judgment creditors of the corporation levied on the personal property. The mortgagee sought to foreclose, joining the creditors as defendants. It was decided that as the corporation had no residence in Arkansas, the recording of the mortgage did not give the mortgagee a lien as against the creditors who had sued before the foreclosure, as, under the law,⁴ the mortgage of personal property, to be valid as against third parties, must be recorded in the county of the mortgagor's residence.⁵

Personal property mortgaged in Alabama was casually taken into Georgia, but the mortgagor still residing in the former State. To secure the rights of the mortgagee it was

¹ *Herrick v. Marshall*, 66 Me. 435; *Hutchinson v. Murchie*, 74 Me. 187.

In Maine, as between the parties to a mortgage, a mortgage upon goods which authorizes the mortgagor to sell them, and with the proceeds of such sale to purchase other goods to take their place, is valid as to such after-acquired property. *Allen v. Goodnow*, 71 Me. 420; *Deering v. Cobb*, 74 Me. 332.

² *Gorham v. Summers*, 25 Minn. 81; *People v. Bristol*, 35 Mich. 28; *Smith v. Waggoner*, 50 Wis. 155; *Marlet v. Hinman* (Wis.), 45 N. W. Rep. 953.

³ *Cool v. Roch*, 20 Nebr. 550.

⁴ *Mansf. Dig.* § 4742.

⁵ *Watson v. Thompson Lumber Co.*, 49 Ark. 83.

not necessary that the mortgage be recorded in Georgia also.¹ And a mortgage not complying with the statute, though recorded, is not valid as to third persons, and cannot be considered as sufficient notice.² So, also, a record without an acknowledgment, when required by statute, or without an affidavit, where the statute requires it, is not sufficient, and is also ineffectual if the certificate of acknowledgment is defective.³

§ 353. In Iowa, a chattel mortgage delivered to the recorder at 6:30 P. M. was so indorsed by him, but not entered in the index until 8:30 the next morning, and after an attachment had been levied upon the property mortgaged. The Iowa law⁴ makes it the duty of the recorder to note the time of filing, and to enter it in the index, and provides that from the time of such entry the instrument shall be deemed complete as to third parties. Under these circumstances the attaching officer could not be charged with constructive notice of the mortgage by reason of the custom of the recorder not to enter in the index until the next day, instruments received late in the evening.⁵

§ 354. In North Carolina, while unregistered deeds in trust and mortgages are inoperative as against creditors and purchasers for value, until registered, yet, when registered, they are effectual between the parties from the delivery, and against third persons who have not acquired any intervening rights.⁶

§ 355. Conflict of Authority.—As to what is a sufficient record of an instrument is a question upon which the authorities do not agree. But the weight of authority holds that when a party has duly deposited his deed with the proper officer for record, he has performed his duty, and

¹ Peterson v. Kaigler, 78 Ga. 464.

² Frank v. Miner, 50 Ill. 444.

³ Hill v. Gilman, 39 N. H. 88. See Section 360.

⁴ Code, § 1925.

⁵ Hibbard v. Zenor, 75 Iowa 471.

⁶ Brem v. Lockhart, 93 N. Car. 191.

consequently a subsequent mistake or malfeasance of the recorder will not affect the mortgagee or invalidate his title.¹ Thus, a chattel mortgage is to be deemed filed when it is delivered to and received and kept by the proper officer, in his office, for the purpose of filing, notwithstanding he omits to place it with the other chattel mortgages in his office.² So, also, where a mortgagee files or causes to be filed his mortgage, according to the statutory provisions, the malfeasance of the clerk or recording officer in permitting it to become lost or abstracted, and representing that it, or a copy thereof, was not on file, will afford no protection to a *bona fide* purchaser without actual notice; the mortgagee's interests will be protected.³

But, on the other side, it is held to be the duty of the party filing the instrument, as between himself and a subsequent *bona fide* purchaser, to see that all of the prerequisites of validity of the deed as to registration be complied with.⁴

§ 356. **Book of Record.**—Recording a chattel mortgage in the book for real-estate mortgages is sufficient to give third persons notice, even if the property is a fixture. Thus, a party gave a mortgage upon machinery, and then leased land upon which to place it. The mortgage was recorded in the records of mortgages of real estate. This was held valid as against a subsequent purchaser of the personalty.⁵ So, also, a mortgage of both real estate and personal property, recorded in the book for real estate, according to the custom of the recording officer, is not therefor invalidated.⁶ So, a

¹ *People v. Bristol*, 35 Mich. 28; *Wolf v. Hunter*, 10 Ill. App. 32; *Nichols v. Reynolds*, 1 R. I. 30; *Cook v. Hall*, 1 Gilm. (Ill.) 575; *Merrick v. Wallace*, 19 Ill. 486; *Dubose v. Young*, 10 Ala. 365; *Monaghan v. Longfellow*, 81 Me. 298; *Beverly v. Ellis*, 1 Rand. (Va.) 102; *Dikeman v. Puckhafer*, 1 Daly (N. Y.) 489; *Gorham v. Summers*, 25 Minn. 81; *Chase v. Bennet*, 58 N. H. 428.

² *Appleton Mill Co. v. Warder*, 42 Minn. 117. See, also, *Keating v. Retan* (Mich.), 45 N. W. Rep. 141.

³ *Marlet v. Hinman* (Wis.), 45 N. W. Rep. 953.

⁴ *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288; *Jennings v. Wood*, 20 Ohio 261; *Barney v. McCarty*, 15 Iowa 510; *Sawyer v. Rogers*, 8 Vt. 172; *Scoles v. Wilsey*, 11 Iowa 261; *Hibbard v. Zenor*, 75 Iowa 471. See note in 31 Cent. L. Journal 211.

⁵ *Boyle Ice Co. v. Gould*, 78 Cal. 153.

⁶ *Anthony v. Butler*, 13 Pet. (U. S.) 423.

chattel mortgage of fixtures, duly recorded, is notice to a mortgagee of the real estate on which the fixture is located. Thus, a party mortgaged a boiler and engine, which mortgage was duly recorded. Two months afterwards he gave a mortgage on the real estate on which the fixtures were placed. It was held that the chattel mortgage was notice to the mortgagee of the real estate of the rights of the mortgagee of the chattel mortgage.¹

So, a mortgage filed in the proper office, as to a portion of the property, is not rendered inoperative as to such property from the fact that it was not filed in the proper office as to the other chattels.²

An affidavit proving a mortgage, which is taken before a notary public, who is the attorney of the mortgagee, is not a legal affidavit, and a mortgage so proved and recorded is not legally recorded.³

Whether a mortgage has been acknowledged and recorded is a question for the court.⁴

§ 357. **Where Recorded.**—The law controlling the record of chattel mortgages must be strictly complied with. Thus, a livery stable keeper who resided in Vermont, bought horses which he kept and used during the threshing season of three months in New Hampshire. The court held that these horses were "situate" in New Hampshire, requiring the mortgage to be recorded in that State under the statute.⁵

§ 358. **Time to Record.**—It is incumbent upon the mortgagee to show that the mortgage has been recorded within the time specified by the statutes.⁶ Under a statute requiring a mortgage to be recorded within sixty days from the

¹ *Sword v. Low*, 122 Ill. 487.

² *Hubbardson Lum. Co. v. Covert*, 35 Mich. 254.

³ *Nichols v. Hampton*, 46 Ga. 253.

⁴ *Bailey v. Godfrey*, 54 Ill. 507.

⁵ *Lathe v. Schoff*, 60 N. H. 34. See, also, *Watson v. Thompson Lumber Co.*, 49 Ark. 83.

⁶ *Chenyworth v. Daily*, 7 Ind. 284.

time of its execution, a record made on the sixtieth day after its execution is in due time.¹

In Indiana, a failure to record a mortgage in the county in which the mortgagor resides, renders such mortgage void as to all persons other than the parties thereto, whether such persons had or had not acquired a lien upon the property.²

It must be recorded within the statutory time, or it is not valid against subsequent purchasers.³

In Georgia, if the mortgage is not recorded in time, the mortgagee must give way to mortgages and judgments obtained before he had foreclosed his mortgage.⁴ In Minnesota a chattel mortgage is deemed to be filed when it is delivered to and received and kept by the proper officer in his office for the purpose of filing, notwithstanding he omits to place it with the other chattel mortgages in his office.⁵

In Maine,⁶ where the law provides that the clerk shall note on every mortgage and in the record when received, and that it shall be considered as recorded when received, the mortgage is recorded when received by the clerk and date noted on the mortgage, as against subsequent attaching creditors of the mortgagor, though the record is not completed and does not contain the date of the receipt of the mortgage, and it is immaterial that the latter is marked "entered" instead of "received."⁷

The Florida statute⁸ provides that no mortgage of personal property shall be effectual or valid for any purpose whatever, if the mortgage is not recorded, unless the property be delivered within twenty days after the execution of the mortgage. It was held under this law that no time being

¹ *Miller v. Henshaw*, 4 Dana (Ky.) 325.

² *Sidener v. Bible*, 43 Ind. 230.

³ *Denny v. Lincoln*, 13 Met. (Mass.) 200; *Travis v. Bishop*, 13 Met. (Mass.) 304; *Bingham v. Jordan*, 1 Allen (Mass.) 373; *Lockwood v. Slevin*, 26 Ind. 124.

⁴ *Hardaway v. Semmes*, 24 Ga. 305.

⁵ *Appleton Mill Co. v. Warder*, 42 Minn. 117.

⁶ Rev. Stat. of 1857, ch. 91, § 2.

⁷ *Monaghan v. Longfellow*, 81 Me. 298.

⁸ *McClell. Dig.* p. 218, § 1.

prescribed within which the record shall be made, it will be sufficient, as against the creditors, though made after the debt is due, if made before suit for foreclosure, and there are no circumstances, such as unreasonable delay or the death of the mortgagor, after undue lapse of time denoting laches, nor any fraud to impeach the transaction.¹

The Arkansas statute² provides that in order for a mortgage to become a lien on personal property against strangers, without being first filed for record, the mortgagee shall indorse upon it that it is to be filed but not recorded, and shall then file it with the recorder, who shall then mark it "filed," with the time of filing on the back of it, and file it in his office, where it shall be kept for the inspection of all persons interested.

A mortgagee sent his mortgage to the recorder by an agent with verbal instructions, but no indorsement on it, that it should be filed but not recorded. The agent told the recorder that it was not to be recorded, and the recorder laid it aside and waited to see the mortgagee. Afterwards the mortgagee saw the recorder and directed him to record it. The recorder then marked it filed as on the day it was handed him, and recorded it. It was held that the mortgage was not filed for record until the instructions were given to record it.³

§ 359. **When a Valid Lien.**—A chattel mortgage does not become a good and valid lien against creditors until it is filed for record, except where actual notice is sufficient. Thus, at the time of a sale and delivery to the mortgagor of property, there was an execution in the hands of the sheriff against the property, and the lien of such execution attached on the delivery of the property to the mortgagor under the sale, and became a prior lien to that of the vendor, created by means of a chattel mortgage back for the purchase-money, executed

¹ *Reese v. Taylor*, 25 Fla. 283.

² *Mansf. Dig.* § 4750.

³ *Dedman v. Earle*, 52 Ark. 164.

at the time of the sale and delivery of the property, and not filed for record until twenty hours thereafter.¹

§ 360. **When Recorded.**—In those jurisdictions where it is held that the recording officer must fully comply with the statute in noting the time when the mortgage is received, and enter it in the index, before the mortgage will protect the mortgagee, the mortgage of personal property will, nevertheless, take effect from the time it is actually recorded.² And the time when a mortgage was received by the recording officer must be noted both in the book of record and on the mortgage, in order that it should be considered as recorded when left.³

But the record of the mortgage supersedes the necessity of noting in the book of record, at the time, when it was received.⁴ The mortgage takes effect from registration; a creditor acquiring a lien before that time has a claim superior to that of the mortgage, and, as against such creditor, the mortgage has had, in the estimation of law, no existence.⁵

§ 361. **Failing to Keep a Book of Record.**—It seems that a failure to keep a book of registration in which to make the entries as prescribed by statute does not invalidate the mortgage as against a subsequent mortgagee, provided the prior mortgage had been duly filed for record; that such provision of the statute is directory and not mandatory;⁶ because the filing of the mortgage and the indorsement thereon are the principal things to be done as affecting the validity of the mortgage, and notice to all persons interested. The indorsements to be made in a book are not made essential to the validity of the mortgage, or constructive notice of its filing, and therefore the requirements of such indorsements,

¹ *Self v. Sanford*, 4 Ill. App. 328; *Burnham v. Muller*, 61 Ill. 453; *Hardaway v. Semmes*, 38 Ala. 657.

² *Holmes v. Sprowl*, 31 Me. 73.

³ *Handley v. Howe*, 22 Me. 560.

⁴ *Head v. Goodwin*, 37 Me. 181.

⁵ *Hardaway v. Semmes*, 38 Ala. 657; *Wallis v. Rhea*, 10 Ala. 451. See Section 352.

⁶ *Dikeman v. Puckhafer*, 1 Abb. Pr. (N. Y.) N. S. 32; *Smith v. Waggoner*, 50 Wis. 155.

by the established rule of construction, must be held to be merely directory; the failure to make them cannot prejudice the rights of a mortgagee who has done all that the law requires of him to secure the filing of his mortgage by the recording officer.¹

§ 362. **Place of Record.**—Most of the statutory provisions make it necessary to record or file the mortgage where the mortgagor resides, in order that it shall be good against subsequent purchasers and creditors. Thus, a mortgage of goods contained in a branch store of the mortgagor, in a county other than that in which he resides, recorded in the county of his residence, carries title to the goods as against a prior mortgage recorded in the county where the goods were, though possession was delivered to the prior mortgagee;² and in case of doubt, the declarations of the mortgagor, at the time of executing the mortgage, may tend to show the place of his residence.³

A mortgage made during a temporary absence of the mortgagor must be recorded in the county of his permanent residence;⁴ and it must be the place of the mortgagor's residence at the time the mortgage was executed, and not at the time of filing or recording the same.⁵ It matters not even if, at the time of the mortgage's execution, the property is in another county, and never brought to the county of the mortgagor's residence. The statute must be followed;⁶ it must be filed in the town where the mortgagor resides.⁷

Under the Minnesota statute,⁸ where a mortgagor of chat-

¹ *Dodge v. Potter*, 18 Barb. (N. Y.) 193.

It was held in a tax case that the statutory provision as to making an index was mandatory, because it is an act, the omission of which may work injury to those affected by it, and therefore cannot be directory. *Mayhew v. Davis*, 4 McLean C. C. 213.

² *Weaver v. Chunn*, 99 N. Car. 431.

³ *Veazie v. Somerby*, 5 Allen (Mass.) 230.

⁴ *Boyd v. Beck*, 29 Ala. 703.

⁵ *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

⁶ *Vaughn v. Bell*, 9 B. Mon. (Ky.) 447; *Singleton v. Young*, 3 Dana (Ky.) 559; *Powers v. Freeman*, 2 Lans (N. Y.) 127.

⁷ *Reynolds v. Case*, 60 Mich. 76.

⁸ Gen. Stat. 1878, ch. 39, §§ 1-3.

tels resides in one town, and the property is situated in another, the mortgage must be duly filed in both towns.¹

When the mortgage is only required to be registered in the county of the mortgagor's residence, no new record is necessary by the mortgagor's change of residence.²

Under the Alabama Code,³ providing that a chattel mortgage shall be of no effect as to creditors and purchasers, unless recorded in the county of the mortgagor's residence, and also in the county where the property is; and further providing that if the property is removed, the mortgage must also be recorded within six months thereafter in the county to which the property is removed, a failure to record a mortgage in the county in which the property is when the mortgage is executed; renders subsequent registration in the county to which the property is removed ineffectual as to the rights of third persons.⁴

In Texas, a chattel mortgage, registered in Bowie county, Texas, reciting that the mortgagor is of Texarkana, Bowie county, Texas, shows *prima facie* that the mortgagor is a resident of Texas, and that the mortgage is registered in the county of his residence, without proof that the property was in that county.⁵ •

A party in Iowa purchased goods in a county other than the one in which he resided, and gave a mortgage on them, and had it recorded in the county where the goods were, leaving them in possession of his brother, who added to the stock, made sales, paid debts, all in the name of the vendee. It was held that this mortgage was invalid as against the rights of creditors and subsequent purchasers without notice, but it was also held that the mortgage had priority over one of a later date given by the vendee and recorded in the county of his residence.⁶ •

¹ Lundburg v. N. W. Eleva. Co., 42 Minn. 37.

² Harris v. Alden, 104 N. Car. 86.

³ Stat. of 1886, § 1806 *et seq.*

⁴ Pollak v. Davidson, 87 Ala. 551.

⁵ Chator v. Brunswick-Balke-Collender Co., 71 Tex. 588.

⁶ King v. Wallace, 78 Iowa 221.

In South Carolina, a sale of mortgaged property under an improperly-recorded chattel mortgage, will be upheld, as such record is not notice to the mortgagor's vendee residing in a different county from that of the place of sale.¹

§ 363. **Residence in Different Places in the State—Two or More Mortgagors.**—A mortgage of personal property executed by two or more persons residing in different towns in the same State, is invalid as against persons other than the parties thereto, unless it is recorded in every town in which the mortgagors reside, or possession of the mortgaged property is taken and retained by the mortgagee.²

§ 364. **Residing in Different States.**—When some of the mortgagors live in the State and others of them live out of the State, the mortgage must be recorded in the counties in which such residents reside.³

§ 365. **In Case of Partnerships.**—A chattel mortgage must be filed in the city or town where the partners respectively reside, or as the statute provides in case of one person. Thus, a mortgage executed by a firm, upon firm property, is void as against creditors, subsequent purchasers or mortgagees in good faith, unless filed or recorded at the places of residence of the individual members of the firm. In some jurisdictions, if a member be a non-resident, the mortgage must be filed where the property was at the time of execution of the mortgage.⁴

And the general rule is, that a chattel mortgage executed by partners must, as against creditors, be recorded in all the counties or towns, as the statutes shall provide, wherein the partners severally reside, and it is not sufficient to record it in the county or town where one of the partners resides and where the firm does business. Because all the partners are

¹ *London v. Youmans*, 31 S. Car. 147.

² *Morrill v. Sanford*, 49 Me. 566; *Rich v. Roberts*, 48 Me. 548; 50 Me. 395; *Altman v. Guy*, 41 Ohio St. 598.

³ *De Courcey v. Collins*, 21 N. J. Eq. 357. In New Jersey, the mortgage must also be recorded where the chattels are at the time of executing the mortgage.

⁴ *Stewart v. Platt*, 101 U. S. 731. See Section 412.

mortgagors, and as the firm can have no place of residence, the residence of the mortgagors must be that of the individuals composing the partnership.¹

In Michigan a partnership chattel mortgage, made in the firm name signed by the resident partner alone, and the others being non-residents of the State, conveying only firm property, which mortgage was filed in the office of the clerk of the township, according to the statute, where the resident partner resided, and the seat or abiding-place of the firm, is valid.²

Where the members of a firm have their actual, permanent residence in one place, but transact their business where they board for part of the year, but with no intention of changing their domicile, a chattel mortgage given by them should be filed at their permanent residence. But this case of *Hubbardson Lumber Co. v. Covert*³ was distinguished, and it was intimated that it would not apply to fix the residence of the partners living in the State away from its actual place.⁴

One can have a domicile at one place and his residence at another.⁵

§ 366. **Residence of Corporation.**—The chattel mortgage must be filed where the corporation has its principal place of business. The court says: "It would be a most unreasonable construction of the act relating to filing chattel mortgages to hold that they must be filed in each town within the State in which any one of the stockholders of the joint-stock company resides. The statute is complied with if filed in the office of the town clerk of the town where the principal office of the company is located, or its business principally conducted."⁶

¹ *Granger v. Adams*, 90 Ind. 87; *Kane v. Rice*, 10 Bank. Reg. 469; *Westlake v. Westlake* (Ohio), 24 N. E. Rep. 412.

² *Hubbardson Lumber Co. v. Covert*, 35 Mich. 254.

³ 35 Mich. 254.

⁴ *Briggs v. Leitelt*, 41 Mich. 79.

⁵ *Frost v. Dickinson*, 19 Wend. (N. Y.) 11; *Love v. Cherry*, 24 Iowa 204; *Supervisors v. Davenport*, 40 Ill. 197; *Wells v. People*, 44 Ill. 40.

⁶ *Nelson v. Neil*, 15 Hun (N. Y.) 383.

The place where the corporation keeps its office in the State must be regarded as its residence.¹

§ 367. **Recording in Wrong County.**—A mortgage recorded in the wrong county is not effectual. Thus, a party mortgaged his chattels and the mortgage was recorded in the county where the property was located, instead of the county where the mortgagor resided. This was not a sufficient record.² Though the property be subsequently removed into the county of the mortgagor's residence, it is insufficient as to third persons, unless it be there recorded before any liens attach to it.³

§ 368. **Proof of the Mortgagor's Residence.**—When there is a conflict as to the real residence of the mortgagor, it must be proved when the validity of the record is questioned.⁴ A mere recital in the mortgage of the mortgagor's residence is not sufficient to prove it. Such a recital could only estop the mortgagor from claiming a different residence.⁵

The right of subsequent purchasers, creditors and subsequent mortgagees depends not upon recitals or representations of the mortgagors as to their residence, but upon the facts of such residence as established by competent proof. The actual residence controls the place of filing, otherwise the object of the statute would be frustrated by the mere act of the parties.⁶

The description of the mortgagors as of the county where record was made is sufficient, *prima facie*, to show that the mortgage was recorded in the county where the mortgagors reside.⁷

§ 369. **Priority—Construction.**—When two or more parties have mortgages on the same property, and filed at the same minute, priority is determined by the intention of the parties.

¹ Wright v. Bundy, 11 Ind. 398.

² Platt v. Stewart, 13 Blatchf. C. C. 481.

³ Lane v. Mason, 5 Leigh (Va.) 520.

⁴ Bither v. Buswell, 51 Me. 601.

⁵ Platt v. Stewart, 13 Blatchf. C. C. 481.

⁶ Stewart v. Platt, 101 U. S. 731.

⁷ Brown v. Corbin, 121 Ind. 455. See, also, Dutch v. Boyd, 81 Ind. 147.

If one was executed before the other with the intention that it should take priority, it will take precedence.¹

Where a foreclosure proceeding is instituted before the expiration of the time during which the mortgagor is allowed, by the law of Utah,² to remain in possession, the mortgage lien will be superior to that obtained by a levy of execution after the expiration of the time, while the property still remains in the mortgagor's possession.³

A mortgage executed by the mortgagor in possession of the property as owner, although the legal title was not to pass to him until the property was paid for, where such contract of conditional sale was not filed for record, will take precedence over the secret lien of the party claiming to be the real owner of the property.⁴ In an action by a mortgagee against a judgment creditor of the mortgagor, for goods taken upon execution, which were covered by the mortgage, the judgment creditor claimed that the goods were the very same ones sold by him to the mortgagor, which were the consideration of the debt upon which his judgment was founded; but the fact that the judgment creditor sold the goods which he claims a lien on by virtue of an execution, gives him no superior right, the sale to the mortgagor having been complete, and there being no previous fraud in the purchase whereby an equity arose in favor of the vendor.⁵

A mortgagee of personal property which has been previously conveyed by an unrecorded bill of sale, is not chargeable with notice of such prior bill of sale by a clause in the mortgage stating that the said party of the first part warrants the title against all persons except an existing mortgage of record in a certain county, nothing further appearing to show that he had notice.⁶

A mortgagor executed a mortgage in which the property

¹ *Wray v. Fedderke*, 43 N. Y. Sup. Ct. 335.

² Laws of 1884, ch. 21, § 5.

³ *Armstrong v. Broom* (Utah), 13 Pac. Rep. 364.

⁴ *Manning v. Cunningham*, 21 Nebr. 288.

⁵ *Page v. Kendig* (N. J.), 7 At. Rep. 878.

⁶ *Clark v. Barnes*, 72 Iowa 563.

was described as being subject to an earlier unrecorded mortgage to a third party. Then the mortgagor executed another mortgage to the same second mortgagee, in which reference was made in the description of the property of the previous mortgage to the second mortgagee. It was decided that this last was subject to the third party's unrecorded mortgage referred to in the second mortgage.¹

A mortgagee of a cotton crop, in order to gather and secure it, made further advances to the mortgagor; this did not give him a lien on the proceeds of the sale of the crop, that took precedence of a lien created by a second mortgage or deed of trust, executed to a trustee to secure an indebtedness due from the mortgagor to his wife for money advanced to him.²

In Illinois, if the holder of a chattel mortgage forecloses by sale to the mortgagor, and takes back a new mortgage on the same property for the purchase-money, the foreclosure sale and taking back the new mortgage constitute but one transaction; the new mortgage will be subject to any other lien existing at the time of the foreclosure, unless the mortgagee retains possession of the property until the new mortgage has been recorded.³

Two parties form a partnership in which one of them puts certain machinery covered by an unrecorded mortgage. The other partner sold his interest to three others, who continued the business with the one putting in the mortgaged machinery. It was held that upon the formation of the partnership this partner ceased to have any individual interest in any portion of the mortgaged machinery, and that as the mortgage was unrecorded, the mortgagee's only remedy was against whatever portion of the partnership assets might remain as this partner's share, after claims against the partnership were satisfied.⁴

¹ *Eaton v. Tuson*, 145 Mass. 218.

² *Weathersbee v. Farrar*, 97 N. Car. 106.

³ *Blatchford v. Boyden*, 122 Ill. 657.

⁴ *Ringo v. Wing*, 49 Ark. 457.

A party had a deed of trust upon cotton, some bales of which were afterwards sold to a third party by the grantor of the trust deed. The third party gave in payment therefor a check in favor of the grantee in the deed of trust. The payment of the check was stopped when it was discovered that a laborer had a lien on the cotton superior to that of the holder of the check. The laborer sued out a writ of seizure, and the cotton was sold, and his claim settled out of the proceeds. The balance was paid by the sheriff to the grantee of the cotton bales, who, before action brought, tendered it to the grantee in the trust deed, in full of his claim. This was decided to be all that he could recover; that this balance tendered was all that he could legally recover.¹

A chattel mortgage is superior to a prior real-estate mortgage, in common form, covering the same chattels, when the chattel mortgagee is in the position of an innocent purchaser.²

A chattel mortgage being signed by the husband and wife, and properly recorded, it is immaterial as to the question of priority whether the mortgaged property was owned by the husband or by the wife, or by both together. An attaching creditor having extended credit to the mortgagor after the mortgage was put upon record, cannot complain that the mortgage is in fraud of his rights.³

One who takes a chattel mortgage within one year after the filing of a previous mortgage, is not a subsequent mortgagee in good faith under the law⁴ providing that chattel mortgages shall cease after one year from the date of filing, unless renewed within thirty days before the expiration of the year.⁵

A failing debtor sent for a creditor whom he had promised to protect, who met him late in the evening and took a

¹ *Ross v. Wardlaw* (Miss.), 3 South. Rep. 74.

² *Howard v. Witters*, 60 Vt. 578.

³ *Eddy v. McCall*, 71 Mich. 497.

⁴ *Howell's Stat.* § 6196.

⁵ *Wade v. Strachan*, 71 Mich. 459.

chattel mortgage in ignorance of one which had been given to another party on the same property in the morning. The second mortgage recited that the property was unincumbered. It was decided that the failure of the second mortgagee to inquire whether there was a prior mortgage must arise from bad faith and not merely ignorance of the invalidity of his mortgage put on record first, as against the first mortgagee.¹

In the absence of fraud, a mortgage to secure the mortgagee's contingent liability as security for the mortgagor to an amount not greater than the debt, is valid against subsequent mortgages.²

Where a mortgage secures several notes due at different times, and there is no special provisions to the contrary, they have priority of lien in the order of their maturity.³ Where a sale of property, subject to a chattel mortgage, is expressly made subject to the mortgage, the purchaser does not take in good faith, and cannot attack the mortgage on the ground of fraud; and one to whom he later mortgages the property has no greater rights.⁴ A lien of a chattel mortgage is not affected by a prior parol agreement between the mortgagors and third persons that their mortgage to be executed by the mortgagors shall have priority, where another mortgage is actually executed and delivered in violation of such agreement, and with the intent to give it priority; and it is immaterial whether or not the mortgagees had notice of a prior parol agreement.⁵

Defendant sold to B. certain machinery and took his note for the price, containing a stipulation that, until paid, the title to the machinery should remain in the defendant.

¹ *Miller & Co. v. Olney*, 69 Mich. 560.

An attachment of the undelivered mortgaged chattels prior to the record required by the statute, is prior to the mortgage lien. *Ramsey v. Glenn*, 33 Kans. 271.

² *Sparks v. Brown*, 33 Mo. App. 505.

³ *Marseilles Mfg. Co. v. Rockford Plow Co.*, 26 Ill. App. 198.

⁴ *Ludlum v. Rothschild*, 41 Minn. 218.

⁵ *Lazarus v. Henrietta Nat. Bank*, 72 Tex. 354.

Plaintiff, through whose agency the machinery was sold, and who had actual notice of the stipulation, having had the notes in his hands, as defendant's attorney, for collection, after their maturity took a mortgage on the machinery to secure his own debt and recorded it. Defendant subsequently took new notes from B. in lieu of the first series, and took a mortgage on the machinery as security. It was held that, as the plaintiff took his mortgage, the title to the machinery was in defendant, B. had no power to give the mortgage, and it could not be asserted as a lien to defendant.

If taking new notes by defendant be regarded as payment of the old, thus extinguishing the lien conferred by them, the whole transaction must be regarded as a resale of the machinery to B. at the time the mortgage was first given to secure the purchase price, and such mortgage would be a superior lien to that previously given to plaintiff at the time when the mortgagor had no title.¹

A partner having one-half interest in a stock of goods, mortgaged his moiety to secure an individual debt, and soon after bought his partner's interest, giving a mortgage on the entire stock, which he agreed to keep up to the value of \$3,000, to secure the purchase-money. There was no evidence that the stock was ever worth so much, or what its value was at that time. The records show that it was sold by a receiver, who had, as the proceeds, \$600 in his hands. There was no evidence that any of it had been used in the payment of partnership debts. It was held that no presumption existed that any of the stock was so used, and that the first mortgage constituted a paramount lien on one-half the proceeds, and the second on the other.²

If a party takes chattels by conditional purchase, and goes into possession under his bill of sale with the consent of the vendor, who afterwards makes a chattel mortgage of the same goods, the vendee's rights are superior to the mortgagee's, or his assignee's, and it makes no difference that the

¹ *Taylor v. Barker*, 30 S. Car. 238.

² *Burdette v. Woodworth*, 77 Iowa 144.

bill of sale was not filed or recorded.¹ Thus, an agreement made on the sale of a stock of goods that one who had advanced part of the price was to be repaid out of the proceeds of the business before the balance of the price should be paid, is not an agreement to give a chattel mortgage on the goods, and the vendor, who subsequently took possession of the goods under an unrecorded bill of sale given to secure the unpaid price, and also under an agreement whereby he was to carry on the business until he had realized sufficient to pay such balance, is entitled to priority over the person who made the advances, and who procured a chattel mortgage of the goods while the vendor was in possession. Though the bill of sale of the goods was procured from the purchaser by the fraud of the seller, yet if the latter was in possession of the property by consent of the purchaser under an agreement whereby he was to carry on the business until he had realized sufficient to pay for the stock, his position was that of a pledgee in possession, and his rights are superior to the chattel mortgage.²

§ 370. **Priority by Agreement.**—Priority may be created by agreement. Thus, where two chattel mortgages are executed on the same day on the same property, with the understanding that one party should have precedence, such agreement is binding upon them, though the other party filed his mortgage first.³

§ 371. **Withdrawal from the Files.**—The recording officer has no right to allow an instrument filed in his office to be taken away. But if he does, and it is returned, it is still notice to subsequent purchasers and creditors after its return.⁴ This rule goes further in Ohio, where the temporary withdrawal of the instrument from the recorder's office will not prejudice the rights of the mortgagee, if done with the intent

¹ *Cameron v. Marvin*, 26 Kans. 612; *Pettee v. Dustin*, 58 N. H. 309.

² *Finn v. Donahoe* (Mich.), 47 N. W. Rep. 125.

³ *Corbin v. Kincaid*, 33 Kans. 649; *Chadbourn v. Rahilly*, 28 Minn. 394.

⁴ *Woodruff v. Phillips*, 10 Mich. 500. But the court says, if a purchaser had called at the office to see the mortgage while it was away, a different question would have arisen. See *Jones v. Parker*, 73 Me. 248.

to return it. In contemplation of law, says the court, it was "on file in the office," although out of the recorder's room.¹

In Nebraska the statute requires a filing of the original, or a copy thereof, with the clerk, who indorses on the instrument or copy the time of its receipt, and keeps the same in his office for the inspection of all persons. Where a mortgage has been so filed, it cannot be withdrawn for the purpose of foreclosure.² If a mortgage, after being filed, is wrongfully withdrawn without the mortgagee's consent, his lien is not thereby divested. In this case the attaching creditor had notice that the mortgage had been withdrawn without the mortgagee's consent. But the court said if the creditor had been ignorant of the manner in which the mortgage was abstracted, and had called to learn that it was not on file, a different question would have arisen.³

§ 372. **Interpretation of Words.**—The word "date" in the Massachusetts Statute of 1874, ch. 111, relating to the recording of mortgages of personal property, is not limited to the date stated in the "*in testimonium*" clause, but refers to the day of the delivery of the deed.⁴

The words "goods and chattels," as used in the recording acts of West Virginia, do not embrace choses in action.⁵

§ 373. In Arkansas, the act of March 10th, 1877, provides that chattel mortgages are made notice to all the world on being filed, if indorsed by the mortgagee, "this instrument is to be filed but not recorded;" it is sufficient if the indorsement over the mortgagee's name is, "to be filed but not recorded."⁶

§ 374. **The Recorder's Agent May Receive for Registration.**—If the recording officer leaves a clerk in charge of the books when he is absent, the clerk can legally receive the

¹ Wilson v. Leslie, 20 Ohio 161.

² Ward v. Watson, 24 Nebr. 592.

³ Swift v. Hall, 23 Wis. 532.

⁴ Orcutt v. Moore, 134 Mass. 48.

⁵ Tingle v. Fisher, 20 W. Va. 497.

⁶ State v. Smith, 40 Ark. 431.

mortgage for registration.¹ Or if there be a vacancy in this office, the person in charge can legally receive the mortgage for filing or registration.²

§ 375. **Unrecorded Mortgages—Failure to Record.**—Under the Texas act, which avoids unrecorded mortgages and conveyances as against creditors without notice, “creditors,” as used in the act, mean those who have acquired some lien on the property by attachment or otherwise.³ The words “purchasers or mortgagees in good faith,” as used in the Michigan statute,⁴ providing that, as to such a purchaser or mortgagee, a prior mortgage, unaccompanied by delivery, shall be void unless filed, mean a purchaser or mortgagee for valuable consideration without notice.⁵ Although a mortgagee may have failed to record the mortgage, if he takes possession of the property after condition broken, he will be entitled to hold it as against creditors of the mortgagor subsequently levying an execution or attachment.⁶ And a chattel mortgage duly recorded is not affected by the fact that it was given in renewal of other mortgages which had not been recorded.⁷

A bill of sale on a canal boat, recorded as a chattel mortgage, is not merely presumptively fraudulent but absolutely void, both under the provisions of the New York Revised Statutes relating to chattel mortgages, and under the laws of 1864,⁸ requiring chattel mortgages of boats navigating the canal to be filed in the office of the auditor of the canal department, and providing that every mortgage or conveyance intended to operate as a mortgage, on any such canal boat, not accompanied by the immediate delivery and fol-

¹ *Dodge v. Potter*, 18 Barb. (N. Y.) 193; *Bishop v. Cook*, 13 Barb. (N. Y.) 326.

² *Bishop v. Cook*, 13 Barb. (N. Y.) 326. See, also, *Fairbanks v. Davis*, 50 Vt. 251.

³ *Overstreet v. Manning*, 67 Tex. 657.

⁴ 2 Howell's Stat. § 6193.

⁵ *People's Saving Bank v. Bates*, 120 U. S. 556.

⁶ *Applewhite v. Harrell Mill Co.*, 49 Ark. 279.

⁷ *Johnson v. Stellwagen*, 67 Mich. 10.

⁸ Ch. 412, §§ 1, 2.

lowed by an actual and continued change of possession, shall be absolutely void as against creditors of the mortgagor, unless so filed.¹

In North Carolina² there is a provision that no deed of trust or mortgage of real estate or personal property shall be valid against creditors but from the time of registration. Another section³ provides that all conditional sales of personal property in which the title is retained by the vendor, shall be reduced to writing, and registered. A vendor sold by a written contract certain goods, agreeing to take notes of the vendee in payment; the parties further agreeing that the vendee should send to the vendor all notes taken by him for any of the goods sold, and the lien on all open accounts, as collateral security for the notes, and all the goods and proceeds to be held in trust by the vendee for payment of the notes to the vendor. This transaction was not within the provisions of the statutes, and did not require registration in order to be operative against creditors.⁴

In New York a creditor who receives goods in payment of his debt, is a purchaser in good faith within the purview of the statutes which declare that an unfiled chattel mortgage is void as against subsequent purchasers in good faith.⁵

A chattel mortgage which is not recorded in the proper county, cannot affect a *bona fide* purchaser with constructive notice.⁶

Where a chattel mortgage is not acknowledged nor filed for record until after the property has gone into the hands of a receiver appointed in a suit by the vendor to enforce his right to the purchase price of the property, the mortgagee is not entitled to priority of lien.⁷

¹ Keller v. Paine, 107 N. Y. 83.

² Code, § 1254.

³ Code, § 1275.

⁴ Chemical Co. v. Johnson, 98 N. Car. 123.

⁵ Button v. Rathbone, 118 N. Y. 666.

⁶ London v. Youmans, 31 S. Car. 147.

⁷ Smith v. Fletcher (Ark.), 11 S. W. Rep. 824.

Under the New York law¹ an absolute bill of sale which the evidence shows was intended as a chattel mortgage, is void as against an attaching creditor, unless filed in the proper office, or unless there was an actual delivery of the property, and an actual and continued change of possession, and whether there was a delivery and change of possession is a question for the jury.²

A chattel mortgage which is withheld from the records at the request of the mortgagor because it would injure his credit, cannot avail against a creditor who subsequently takes the notes of the mortgagor in settlement of a suit, the extension of credit, in good faith, in the belief that the mortgagor's property is unincumbered, and the creditor's rights cannot be affected by the subsequent filing of the mortgage.³

The Georgia Code⁴ requires mortgages to be recorded in the county where the mortgagor resides at the time of the execution of the mortgage, and declares that mortgages not recorded within the time required, though valid as against the mortgagor, are postponed to all other liens created or obtained before the actual record of the mortgage. Thus, a chattel mortgage executed in February, but not recorded, will be postponed to a judgment obtained in the following November.⁵

§ 376. **As to an Assignee.**—A chattel mortgage to secure a valid debt, given before execution of assignment for the benefit of creditors, but not filed until days afterwards, is not void as against the assignee for want of filing, unless he shows that he represents creditors who became such after the making and before the filing of the mortgage.⁶

§ 377. **Evidence of Record.**—In New York, the certificate of the town clerk is not evidence that the paper purporting

¹ Laws of 1833, ch. 279, § 1.

² *Siedenbach v. Riley*, 111 N. Y. 560.

³ *Sanger v. Gunther*, 73 Wis. 354.

⁴ Code, §§ 1956, 1957.

⁵ *Thompson v. Morgan*, 82 Ga. 548.

⁶ *Brown v. Brabb*, 67 Mich. 17.

to be a copy of the mortgage, is a copy. The mortgage and its contents must be proved by common-law evidence.¹

In Massachusetts, the testimony of the owner of a vessel, that on a certain day he mortgaged her to a certain person for a particular sum, together with a memorandum upon her registry of such mortgage, is competent to prove that there was a mortgage of the vessel, in connection with the testimony of the sole executor of the mortgagee, that a careful search has failed to find the original paper.² It is also held in this State that a certificate of the recording officer is conclusive evidence that a mortgage has been recorded.³

§ 378. In Texas a chattel mortgage, indorsed by the county clerk as "filed for record," is not sufficient to show such filing and deposit as to render it admissible against creditors of the mortgagor.⁴

§ 379. In Missouri recorded mortgages as to third parties are not alone evidence of title against claimants, unless it be shown that the mortgagors had title.⁵

§ 380. Proof of Contents.—In order to prove the contents of a chattel mortgage on the trial, not otherwise provided by statute, the original mortgage must be produced. Thus, a certified copy, made by the clerk or the register where the mortgage was filed, is only evidence of the fact of its filing.⁶

¹ *Bissell v. Pearce*, 28 N. Y. 252.

² *Adams v. Pratt*, 109 Mass. 59.

³ *Fuller v. Cunningham*, 105 Mass. 442; *Jordan v. Farnsworth*, 15 Gray (Mass.) 517; *Thayer v. Stark*, 6 Cush. (Mass.) 11. See, also, *Head v. Goodwin*, 37 Me. 181; *Ferguson v. Clifford*, 37 N. H. 86.

⁴ *Brothers v. Mundell*, 60 Tex. 240.

⁵ *Mertens v. Kielmann*, 79 Mo. 412.

⁶ *George v. Tall*, 39 How. Pr. (N. Y.) 497. See, also, *Hewitt v. Morris*, 37 N. Y. Supr. Ct. 18.

ARTICLE III.—REFILING.

- 381. Statutory Provisions.
- 382. When the Copy is not Exact.*
- 383. When Not Necessary Under the Statute.
- 384. When the Mortgagee has Taken Actual Possession.
- 385. Computing the Time.
- 386. Renewal—Construction.
- 387. In Ohio.
- 388. In Wisconsin.
- 389. In Michigan.
- 390. In New York.
- 391. In New Jersey.
- 392. A Valid Refiling.
- 393. When the Mortgagor Becomes a Non-resident.
- 394. Statement of the Mortgagee's Interest Must be Made.
- 395. By Whom Made.
- 396. Accuracy of Statement.

§ 381. **Statutory Provisions.**—In many States chattel mortgages cease to be valid at the expiration of one year from time of filing or recording, unless the mortgage or a true copy thereof is filed anew, or unless a new affidavit is made within the last thirty days, or other short time before the end of the year;¹ in other States the refiling must be at the end of two years,² and others at the end of three years.³

§ 382. **When the Copy is Not Exact.**—When the copy refiled is not exact, yet, if it be sufficient to put a third person upon inquiry, it will be sufficient. Thus, a copy filed was not an exact copy, as required by the statute. It stated

¹ New York, Laws of 1873, ch. 501, p. 767; Laws of 1833, ch. 279, § 5; Ohio, Rev. Stat. § 4155; Michigan, Rev. Stat. § 6196; Kansas, Com. Laws, ch. 68, § 11; Oregon, Gen. Stat. ch. 6, § 48; Nevada, Laws of 1885, ch. 54; Montana, Laws of 1885, ch. 4; Utah, Laws of 1885, ch. 5; New Mexico, Com. Laws, § 1589; Arkansas, Mansf. Dig. §§ 4750, 4751.

² Illinois, Rev. Stat. 1887, art. 95, § 4; Wisconsin, Rev. Stat. § 2315; Minnesota, Gen. Stat. 1878, ch. 39, § 3; Acts of 1879, ch. 65, § 3; Colorado, Gen. Stat. of 1883, § 165.

³ Dakota, Civil Code, § 1748; Delaware, Rev. Stat. ch. 63, § 4 *et seq.*

In Pennsylvania, a chattel mortgage is not valid for a longer period than three months after its maturity, unless it be renewed within the period of said three months, which continues it in force one year from the maturity thereof. Act of April 28th, 1887.

In Alabama no renewal is necessary, and in the following States: California, Florida, Indiana, Iowa, Kentucky, Maine, Missouri, Nebraska, North Carolina, Vermont, Washington. In Colorado, in all cases where mortgages are given to secure more than \$2,500, the renewal must be made annually.

accurately the debt and that the mortgage was unpaid, and described with certainty the property, except the original numbers upon brass plates upon machinery. These numbers, in fact, had been changed by the mortgagor, in order that he might perpetrate a fraud by selling it as unincumbered.

The vendee examined the record and had knowledge of facts sufficient to put him upon inquiry. It was held that the vendee's title to the property could not take precedence to that of the mortgagee, although there was no bad faith on the vendee's part.¹

§ 383. **When Not Necessary Under the Statute.**—Refiling is not necessary for the purpose of protection against those persons to whom no record was necessary in the first instance. So, when the provision of the statute has not been complied with, it is no defense to an action against a person who holds the goods wrongfully, which he had purchased before the expiration of the year.² But, unless it be duly refiled, it will be void as against a levy made within the year by an execution creditor of the mortgagor.³ And a chattel mortgagee in possession need not renew his mortgage by affidavit, in order to maintain an action for the possession of the property taken from him while the mortgage continued in full force.⁴ And the omission to refile in some States gives no rights to a subsequent mortgagee with notice.⁵ If not filed until after the year, the lien is restored as against an execution issued after the refileing.⁶

§ 384. **When the Mortgagee Has Taken Actual Possession.**—When the mortgagee has taken actual possession the mortgage need not be refiled,⁷ and the mortgage is valid against

¹ *Mack v. Phelon*, 92 N. Y. 20. Under New York rule a true copy must be filed. *Stackhouse v. Allard*, 4 T. & C. (N. Y.) 279; *Patterson v. Gillies*, 64 Barb. (N. Y.) 563; *Marsden v. Cornell*, 62 N. Y. 215; *Porter v. Parmley*, 52 N. Y. 185; *Ely v. Carnley*, 19 N. Y. 496.

² *Manning v. Monaghan*, 23 N. Y. 539; *Wiles v. Clapp*, 41 Barb. (N. Y.) 645.

³ *Thompson v. Van Vechten*, 6 Bosw. (N. Y.) 373.

⁴ *Bates v. Wilbur*, 10 Wis. 415.

⁵ *Hill v. Beebe*, 13 N. Y. 556; *Wetherell v. Spencer*, 3 Mich. 123.

⁶ *Nixon v. Stanley*, 33 Hun (N. Y.) 247.

⁷ *Porter v. Parmley*, 52 N. Y. 185; *Nat. Bank v. Sprague*, 21 N. J. Eq. 530.

a judgment creditor levying upon the property after the mortgagee has this possession.¹

§ 385. **Computing the Time.**—When the year expires on Sunday, that day is included in the period stated by the law.² The refiling must be done within the year from the hour of the next preceding filing. Fractions of a day are not to be disregarded in computing the year.³

The year within which the affidavit for the renewal of a chattel mortgage must be filed begins to run from the hour of the day on which the mortgage was filed. When, therefore, the mortgage was filed January 1st, 1880, at 7:30 A. M., and a levy under an execution was made on the property January 1st, 1881, at 5 P. M., the affidavit of the renewal not having been filed, the lien of the execution superseded that of the mortgage.⁴ When computing the time when a chattel mortgage must be recorded, the day of its execution must be excluded, and the day of recording included.⁵

§ 386. **Renewal—Construction.**—In Oregon the affidavit of continuance of a chattel mortgage,⁶ to be filed within thirty days next preceding the expiration of the year from the time of filing, is invalid if filed prior to the thirty days.⁷

A renewal on May 20th, 1882, of a mortgage filed June 6th, 1881, is made within thirty days next preceding the expiration of the year from the filing.⁸

§ 387. **In Ohio** a chattel mortgage not reverified and refiled within thirty days next preceding the expiration of the one year from its filing under the law,⁹ is void as against creditors and *bona fide* purchasers and mortgagees, and the mort-

¹ *Dayton v. People's Saving Bank*, 23 Kans. 421.

² *Paine v. Mason*, 7 Ohio St. 196; *Nitchie v. Townsend*, 2 Sandf. (N. Y.) 299.

³ *Seaman v. Eager*, 16 Ohio St. 209.

⁴ *Lockwood v. Crawford*, 29 Kans. 286.

⁵ *Towell v. Hollweg*, 81 Ind. 154.

⁶ *Miscel. Law*, ch. 6, tit. 3, § 48.

⁷ *Case Threshing Machine Co. v. Campbell*, 14 Oreg. 460.

⁸ *Howell's Stat.* § 6196; *Burrill v. Wilcox Lum. Co.*, 65 Mich. 571.

⁹ *Rev. Stat.* § 4155.

gage so refilled four days after the expiration of the one year creates no lien as against a subsequent levy.¹

§ 388. In **Wisconsin** a chattel mortgage was filed with the town clerk February 23d, 1882. On January 18th, 1884, an affidavit was filed in attempted renewal thereof. This was not in compliance with the law² which requires such affidavit to be filed within thirty days next preceding two years from the filing of the mortgage, and the mortgage was void as to *bona fide* purchasers.³

§ 389. In **Michigan**, one who takes a chattel mortgage within one year after the filing of a previous mortgage, is not a subsequent mortgagee in good faith, within the meaning of the statute providing that chattel mortgages shall cease to be valid as against creditors and subsequent purchasers, or mortgagees in good faith, after the expiration of one year from the date of filing, unless renewed within thirty days next preceding the expiration of the year.

The court say: "The language of our statute referring to subsequent purchasers and mortgagees in good faith, refers to those who became so subsequently to the expiration of the year, and before the renewal affidavit is filed. A person who takes a second mortgage within the year is affected with notice of the mortgage on file; but after the year has expired, and there has been no renewal, a person who takes a mortgage is not affected by notice created by the filing of the first mortgage. The office and effect of filing as notice expire with the year, and remain so until renewed by filing the affidavit, and then by force of the proviso, as to all persons except those acquiring liens in good faith, or purchasers or mortgagees in good faith, in the interim."⁴

§ 390. In **New York** it is held that subsequent purchasers and mortgagees include those who become such at any time

¹ Cooper v. Koppes, 45 Ohio St. 625.

² Rev. Stat. p. 655, § 2315.

³ Rice v. Kahn, 70 Wis. 323.

⁴ Wade v. Strachan, 71 Mich. 459; citing Wetherell v. Spencer, 3 Mich. 123, and overruling Briggs v. Mette, 42 Mich. 12.

after the first filing, and not merely those who become such after the failure to refile; that one who takes a chattel mortgage within one year after the filing of the previous mortgage is not a subsequent mortgagee in good faith. Such purchasers and mortgagees have notice of the existing mortgage, and take title subject to it.¹ But a subsequent creditor may take advantage of the omission to refile, though a subsequent purchaser cannot. A general creditor may take advantage of the omission, though his right accrued previous to the default.¹ A subsequent mortgagee cannot question a prior mortgage for default in not refiling it, for such mortgagee is not considered a purchaser for value.²

§ 391. In *New Jersey*, under a former statute, the rule is that purchasers and mortgagees who become such before the expiration of the year cannot take advantage of an omission to file the mortgage, as they have notice of the existing mortgage and therefore take title subject to it. They stand in the position the mortgagor was in when they took title from him.³ But failure to refile the mortgage within the time prescribed, invalidates it both against creditors who may afterwards seize the property and against purchasers who may afterwards buy it.⁴

§ 392. **A Valid Refiling.**—The refiling before the thirty days specified, is ineffectual.⁵ The filing of a chattel mortgage before the commencement of the thirty days, is not sufficient to preserve the lien of such mortgage beyond the year of the first filing.⁶ The refiling must be effected within the time limited for that purpose. It is nugatory if done either before or after that time. The refiling after that time is not effectual to revive and continue the validity of the

¹ *Manning v. Monaghan*, 23 N. Y. 539; *Lewis v. Palmer*, 28 N. Y. 271; *Meech v. Patchin*, 14 N. Y. 71; *Wiles v. Clapp*, 41 Barb. (N. Y.) 645; *Dillingham v. Ladue*, 35 Barb. (N. Y.) 38; *Latimer v. Wheeler*, 30 Barb. (N. Y.) 485.

² *Thompson v. Van Vechten*, 27 N. Y. 568.

³ *Nat. Bank v. Sprague*, 21 N. J. Eq. 530.

⁴ *Nat. Bank v. Sprague*, 21 N. J. Eq. 530.

⁵ *Rice v. Kahn*, 70 Wis. 323.

⁶ *Biteler v. Baldwin*, 42 Ohio St. 125.

mortgage for a year after such refileing. It must be refiled within the period limited for the purpose, which is usually thirty days previous to the expiration of the term of one year or more from the first filing. The refileing before the commencement of the thirty days would be wholly unavailing, and as nugatory as the refileing after the expiration of that time.¹

§ 393. **When the Mortgagor Becomes a Non-Resident.**—The intervening of circumstances to prevent the refileing in the time specified, does not answer to make the refileing unnecessary. Thus, when the mortgagor becomes a non-resident of the State, and the refileing cannot be complied with, the statute operates the same as when he was in the State, and the mortgage becomes ineffectual if not refiled.²

§ 394. **Statement of the Mortgagee's Interest Must Be Made.**—The statement of the mortgagee's interest must be made when the refileing takes place. It must be positive and clear, in order to give precise information to third parties.³

§ 395. **By Whom Made.**—The statement must be made by the parties designated in the statute or by their attorney or authorized agents. Thus, the statement made by a third party without authority, or by the mortgagor, without the mortgagee's consent, is not sufficient. The mortgagor could not be expected to file the statement with justice to all parties.⁴

§ 396. **Accuracy of Statement.**—Reasonable accuracy is only required.⁵ Thus, the statement that "somewhere about the sum of sixty dollars, as near as can be ascertained," is sufficient.⁶ The statement must be made in good faith, and be substantially correct; this will comply with the statutory provisions.⁷

¹ *Cooper v. Koppes*, 45 Ohio St. 625. See *National Bank v. Sprague*, 20 N. J. Eq. 13; *Newel v. Warner*, 44 Barb. (N. Y.) 258.

² *Dillingham v. Bolt*, 37 N. Y. 198; overruling, in part, *Dillingham v. Ladue*, 35 Barb. (N. Y.) 38.

³ *Marsden v. Cornell*, 62 N. Y. 215; *Fitch v. Humphrey*, 1 Denio (N. Y.) 163; *Platt v. Stewart*, 13 Blatchf. C. C. 481.

⁴ *Patterson v. Gillies*, 64 Barb. (N. Y.) 563.

⁵ *Patterson v. Gillies*, 64 Barb. (N. Y.) 563.

⁶ *Dillingham v. Bolt*, 37 N. Y. 198.

⁷ *Patterson v. Gillies*, 64 Barb. (N. Y.) 563.

ARTICLE IV.—NOTICE.

- 397. What it Includes.
- 398. Actual Notice—Constructive Notice as to Auctioneers.
- 399. Actual Notice—Effect of.
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- 410. Sufficient Notice When the Mortgagor Removes From the County.
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- 413. Notice to Subsequent Purchasers or Mortgagees.
- 414. Under Statutes Making Unrecorded Mortgages Void.
- 415. In Illinois—Rule.
- 416. In New York.
- 417. In New Jersey.

§ 397. **What it Includes.**—Notice of a prior mortgage may be actual or constructive. Notice implies more than the actual fact brought to one's knowledge. It includes knowledge of the communication of the fact, and knowledge that would lead a party to make inquiries.¹

Under the Michigan statute,² which requires the transfer of possession of the mortgaged chattels, or a recording of the mortgage, a mortgage upon a dock of which the mortgagor is left in possession, no interest in the land being transferred to the mortgagee, is void as against an execution levied upon the land by a judgment creditor of the mortgagor, the mortgage not being filed till after the levy.³

In an action by a party who claimed the property under a subsequent mortgage, but filed prior to the first, it was held that evidence of the erasure of the clause in the subsequent mortgage to the effect that the goods were "free and

¹Allen v. McCalla, 25 Iowa 464.

²Howell's Stat. § 6193.

³Tuck v. Olds, 29 Fed. Rep. 738.

clear from all incumbrances," &c., was proper to go to the jury upon the question of actual notice.¹

In Oregon, in case of successive chattel mortgages upon the same property, the one first filed is entitled to priority.²

A mortgagor had been indebted to a party for some years for advances, to secure which he had, from time to time, given chattel mortgages not recorded. On November 10th, 1885, a mortgage was given to secure a debt then due, and a liability on which the mortgagee had become surety. This last mortgage was dated back to January, and was at once recorded. The creditor having been obliged to pay the debt for which he was surety, took possession of the mortgaged property, upon which the sheriff levied an attachment for a debt incurred prior to November. The mortgage was sustained as against the attachment creditor.³

But if the description in a chattel mortgage be insufficient to afford constructive notice, it is valid in most States as against attaching creditors having actual notice.⁴ And what constitutes diligence in making inquiry as to liens on the property, is a question of law, and should not be submitted to a jury.⁵ But there is no rule of law which makes notice of the existence of a debt to be constructive notice of a secret lien created by an unrecorded mortgage by which such debt is secured.⁶

§ 398. **Actual Notice.—Constructive Notice as to Auctioneers, Brokers and Commission Merchants.**—Where actual notice is effective as to third parties, it should be equivalent to actual knowledge, and cannot be inferred, even from an opportunity of knowledge, unless the opportunity be such that the inference of knowledge is conclusive.⁷

¹ *Williams v. Bresnahan*, 66 Mich. 634.

² *Pittock v. Jordan* (Oreg.), 13 Pac. Rep. 510.

³ *Johnson v. Stellwagen*, 67 Mich. 10.

⁴ *Plano Mfg. Co. v. Griffith*, 75 Iowa 102; *Am. Well Works v. Whitney*, 76 Iowa 400.

⁵ *Pullak v. Davidson*, 87 Ala. 551.

⁶ *Bell v. Tyson*, 74 Ala. 353.

⁷ *Foster v. Gillespie*, 68 Mo. 643; *Hill v. Gilman*, 39 N. H. 88; *Stearns v. Gage*, 79 N. Y. 102; *Sawyer v. Pennell*, 19 Me. 169; *Bacon v. Van Schoon-*

What is constructive notice as to an auctioneer, broker or commission merchant is a question on which there is a conflict of authority. Property is placed in their charge for sale in the ordinary course of business, which they sell and return the proceeds, less their commission, to the principal.

The weight of authority is, however, that such agents receiving mortgaged property from the mortgagor or his agent, and selling the same in due course of trade, are liable to the mortgagee for conversion of the property, though the sale is made in good faith and without actual notice. Thus, a wife of a mortgagor took cattle covered by a mortgage from the county and delivered them to a commission merchant in another county, who sold them the next day in the usual course of trade, returning the proceeds, less the commission, to his principal. The commission merchant had no actual notice, though the mortgage had been properly recorded in the original county. The court held that he was guilty of conversion, and therefore liable to the mortgagee for the property.¹

Judge Valentine held that the commission merchant was liable. "The mortgage was valid. It had been executed and deposited in the office of register of deeds less than one year prior to the sale. The defendant [commission merchant] was bound to take notice of the mortgage, and of the plaintiffs' rights thereunder; and in law the plaintiffs were the owners of the property, and had the absolute right to the possession and the control thereof. The defendant sold and delivered this property to different persons, not under the mortgage or subject to the mortgage, but independent thereof, and as the absolute property of M. A. Blanchard, and attempted to give to the purchasers the absolute title thereto, and absolute control and dominion over the same. All this was in violation of the plaintiffs' rights, and ren-

hoven, 87 N. Y. 446; *Farley v. Carpenter*, 27 Hun (N. Y.) 359; *Bowman v. Roberts*, 58 Miss. 126; *Tootle v. Lyster*, 26 Kans. 589.

¹*Brown v. Campbell Co. (Kans.)*, 24 Pac. Rep. 492; 31 Cent. L. Jour. 395 and note.

dered the defendant liable to plaintiffs as for a conversion of the property."

So, where the mortgagor of goods, of which the mortgagee had the right of immediate possession by a mortgage duly recorded, induced the mortgagee, by false and fraudulent representations, to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold, and the proceeds paid over to the mortgagor, it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had no knowledge, in fact, of the existence of the mortgage.¹

So, where the mortgagor in possession thereof, after default in payment of the mortgage debt, fraudulently delivers the goods to a third person for sale, representing that they are his property, and the person, as agent for the mortgagor, sells them, such third person is liable to the mortgagee for the value thereof, though he acted in good faith, paying the proceeds of the sale to the mortgagor, without reward for his services.²

So, a factor or commission merchant, receiving and selling cotton for a mortgagor, without actual notice of the mortgage, is liable in trover to the mortgagee, provided the mortgage has been properly recorded.³

Conversion is the gist of the action of trover, which is founded on the right of property and possession; and any act of a party, other than the owner, which militates against this conjoint right in law, is a conversion. It is not neces-

¹ *Coles v. Clark*, 3 Cush. (Mass.) 399.

² *Sprights v. Hawley*, 39 N. Y. 441.

³ *Marks v. Robinson*, 82 Ala. 69; and see *Perkins v. Smith*, 1 Wilson 328; *Stephens v. Elwall*, 4 Maule & S. 259; *Macombie v. Davies*, 6 East 517; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Hills v. Snell*, 104 Mass. 173; *Williams v. Merle*, 11 Wend. (N. Y.) 80; *Saltus v. Everett*, 20 Wend. (N. Y.) 266; *Pease v. Smith*, 61 N. Y. 477; *Pool v. Adkinson*, 1 Dana (Ky.) 110; *Bristol v. Burt*, 7 Johns. (N. Y.) 254; *Doty v. Hawkins*, 6 N. H. 247; *Adamson v. Jarvis*, 4 Bing. 66; *White v. Spettigue*, 13 Mees. & W. 603.

sary for a manual taking to make conversion, nor that the party has applied it to his use. The question is, Does he exercise dominion over it in exclusion or in defiance of the owner's rights? If he does, that is conversion, be it for his own or another's use. It is conversion if one takes the property of another and sells it, or otherwise disposes of it, without the owner's authority; or if he takes it for a temporary use only, in disregard of the owner's rights, it is conversion.

The word "conversion," by a long course of practice, has acquired a technical meaning, and means detaining goods so as to deprive the owner, or person entitled to possession of them, of his dominion over them.

Any carrying away of a chattel for the use of one without the owner's consent, or for a third party, amounts to a conversion, because it is inconsistent with the general right of dominion which the owner has in it, who is entitled to the use of it at all times in all places. Such an asportation is a conversion, and upon this principle auctioneers, brokers and commission merchants become liable in trover for selling mortgaged chattels, though without actual notice.

But this doctrine is not uniform. Thus, in Tennessee the registration of a chattel mortgage is not notice thereof to an auctioneer who, in the regular course of business, sells the property and pays over the proceeds to the mortgagor, and in absence of actual notice he is not liable to the mortgagee.¹

Judge Lurton says: "Unless the registration of the mortgage operates as constructive notice, they must be regarded as innocent agents or factors, who have secured the property in the regular course of their business, and sold it as agents for the one who had delivered it to them, and paid over the proceeds to their principal, without knowledge of any incumbrance on his title. * * * Having asserted no lien, claim or title for themselves, as against the mortgagee, they cannot be held guilty of conversion. * * * Will the

¹ *Frizzell v. Rundle*, 88 Tenn. 396. See, also, *Roach v. Turk*, 9 Heisk. (Tenn.) 708; *Parker v. Lombard*, 100 Mass. 405; *Spooner v. Holmes*, 102 Mass. 508; *Rogers v. Huie*, 2 Cal. 571.

registration of this mortgage operate as constructive notice to defendants? If they assert any title or lien or interest in the mortgaged property, then, beyond doubt, they would be affected by the registration. But they do not, and have not, asserted any claim to the mortgaged property whatever. The constructive notice consequent upon registration attaches only to persons who subsequently assert any title, charge or lien, or interest in the property described in the registered instrument, and only in favor of the grantees in such instrument. * * * Defendants, having neither actual nor constructive notice of the mortgage, and having in the whole matter acted only as the innocent agents or factors of the mortgagor, with whom the possession had been left, are not guilty of conversion."

So, if a mortgagor of personal property makes an illegal sale to a third person, a servant of the purchaser, who merely carries the goods from one shop to the other, without any knowledge of the mortgage, or any claim upon the property, is not liable to the mortgagee in an action of trover.¹

The Minnesota court holds the law to be that an agent or servant who, acting solely for his principal or master, and by his direction, and without knowing any wrong, or being guilty of gross negligence in not knowing of it, disposes of or assists the master in disposing of, property which the latter has no right to dispose of, is not rendered liable for a conversion of the property.² But this doctrine is against the weight of authority.

§ 399. **Actual Notice—Effect of.**—In those States where actual notice will take the place of a mortgage not properly filed, a mistake in filing will not render the refiling void to those having such notice.³

¹ *Burditt v. Hunt*, 25 Me. 419.

² *Lenthold v. Fairchild*, 35 Minn. 100.

³ *Hill v. Beebe*, 3 Kern. (N. Y.) 556; *Lewis v. Palmer*, 28 N. Y. 271; *Gildersleeve v. Landon*, 73 N. Y. 609; *Bank v. Davis*, 2 Hill (N. Y.) 451; *Sutton v. Dillaye*, 3 Barb. (N. Y.) 529; *Ingalls v. Morgan*, 10 N. Y. 179; *Goodnough v. Spencer*, 15 Abb. (N. Y.) N. S. 248.

§ 400. **Under Missouri Statute.**—Notice of an unrecorded agreement of a mortgage does not affect the right of creditors of the mortgagor in the property which is specified in the agreement. This follows from the expressed provisions of the statute.¹

§ 401. **When Property is Changed by the Mortgagor.**—Notice to third parties will not be ineffectual, if the mortgagor changes the appearance of the mortgaged property, either by adding to or subtracting from it. This will not impair the mortgagee's title.²

§ 402. **Notice to Subsequent Mortgagee.**—In New York a subsequent mortgagee, with notice of a prior incumbrance on the property, is not a subsequent mortgagee in good faith within the meaning of the statute, which was merely designed to protect those who might otherwise be injured by want of knowledge.³ But in Montana actual notice will not protect a *bona fide* mortgagee against a subsequent mortgagee, when the mortgage is invalid.⁴

§ 403. **Effect of Prior Lien, Though Filed Within Statutory Time.**—If the mortgagee does not take possession of the mortgaged property an attachment takes precedence of the mortgage, in Massachusetts, if made before the mortgage is recorded, although recorded within the time—fifteen days—required by statute.⁵

§ 404. **In Illinois,** in the case of a chattel mortgage, actual notice will not take the place of acknowledgment or record as against subsequent purchasers and incumbrancers,⁶ but it is no

¹ Hughes v. Menefee, 29 Mo. App. 192.

² Southworth v. Isham, 3 Sandf. (N. Y.) 448; Adam v. Wildes, 107 Mass. 128; Simmons v. Jenkins, 78 Ill. 479.

³ Hill v. Beebe, 13 N. Y. 556; Meech v. Patchin, 14 N. Y. 71; Marsden v. Cornell, 62 N. Y. 215; Thompson v. Van Vechten, 27 N. Y. 568; Latimer v. Wheeler, 30 Barb. (N. Y.) 485; Wray v. Feddirke, 43 N. Y. Superior Ct. 335; Manning v. Monaghan, 23 N. Y. 539; Gregory v. Thomas, 20 Wend. (N. Y.) 17; Lewis v. Palmer, 28 N. Y. 271; Benjamin v. Railroad Co., 54 N. Y. 675; Farmers Loan and Trust Co. v. Hendrickson, 25 Barb. (N. Y.) 484.

⁴ Milburn Manuf. Co. v. Johnson (Mont.), 24 Pac. Rep. 17.

⁵ Drew v. Streeter, 137 Mass. 460.

⁶ People v. Hamilton, 17 Ill. App. 599.

objection to such a mortgage that the acknowledgment is defectively proved, when the mortgagee is in possession of the property.¹

So, in Indiana, a chattel mortgage not recorded according to law is void as to third persons, though they have actual notice of it.²

§ 405. In California³ the law makes chattel mortgages good against *bona fide* purchasers, when recorded, "in like manner as are grants of real property."

Grants of real property are deemed recorded when deposited for record, which is sufficient in the case of a chattel mortgage.⁴

§ 406. In Nebraska a chattel mortgage duly filed in the county where the mortgagor resides, is constructive notice of the existence of such mortgage, and will be constructive notice in any county to which the mortgagor may remove the property.⁵

§ 407. In South Carolina a purchaser at a sale gave to the vendor a note for the price, stipulating that the vendor should not part with the title until the money was paid. It was decided that this was an instrument in writing, and, under the law, must be recorded, to constitute a protection against third persons.⁶

§ 408. In Georgia a party having an unrecorded mortgage of chattels foreclosed it. A second party had a junior recorded mortgage on the same property without knowledge of the first mortgage. It was decided that the property was subject to the lien of the junior mortgage, and all that the first mortgagee acquired by the sale under the mortgage was the mortgagor's equity of redemption.⁷

¹ Weber v. Mick, 131 Ill. 520.

² Ross v. Menefee (Ind.), 25 N. E. Rep. 545.

³ Code, § 2957.

⁴ Meherin v. Oaks, 67 Cal. 57.

⁵ Grand Island Banking Co. v. Frey, 25 Nebr. 66.

⁶ Herring v. Cannon, 21 S. Car. 212.

⁷ Kelly v. Shepherd, 79 Ga. 706.

§ 409. In Kentucky, under the law¹ which provides that no mortgage of personal property shall be valid against a purchaser for valuable consideration, or against creditors, until acknowledged or proved according to law and lodged for record, a holder of an unrecorded mortgage, having given notice thereof, may arrest an execution sale of the property under the judgment against the mortgagor, recovered before the execution of the mortgage.²

§ 410. **Sufficient Notice When Mortgagor Removes from the County.**—It is generally held that when the mortgagor removes to another county or town, if the mortgage has been filed or recorded in the county, it need not be filed or recorded in the county of his new residence; that the first record will be constructive notice in any county where he may go.³ If the mortgagee was obliged to record his mortgage in every town or county where the mortgagor might move, the security would be well-nigh worthless; because the creditors, being on the alert, might seize the mortgaged property, or the mortgagor might pass the title to an innocent purchaser.⁴ This rule holds good when the mortgagor may move out of the State, taking the property with him. A purchaser must use due diligence in buying property, and if the owner has just come into the State the purchaser must make inquiry at the former place of residence to see whether the property is incumbered.⁵

¹ Gen. Stat. ch. 24, § 10.

² *Baldwin v. Crow*, 86 Ky. 679.

³ *Grand Island Banking Co. v. Frey*, 25 Nebr. 66; *Elson v. Barrier*, 56 Miss. 394; *Brigham v. Weaver*, 6 Cush. (Mass.) 298; *Pease v. Odenkirchen*, 42 Conn. 415; *Hicks v. Williams*, 17 Barb. (N. Y.) 523; *Offutt v. Flagg*, 10 N. H. 46; *Hoit v. Remick*, 11 N. H. 285; *Borrows v. Turner*, 50 Me. 127; *Whitney v. Haywood*, 6 Cush. (Mass.) 82.

⁴ *Hoit v. Remick*, 11 N. H. 285; *Bevans v. Bolton*, 31 Mo. 437; *Griffith v. Morrison*, 58 Tex. 46; *Feurt v. Rowell*, 62 Mo. 524.

⁵ *Smith v. McLean*, 24 Iowa 322; *Offutt v. Flagg*, 10 N. H. 46; *Feurt v. Rowell*, 62 Mo. 524; *Keenan v. Stimpson*, 32 Minn. 377; *Kanaga v. Taylor*, 7 Ohio St. 134; *Parr v. Brady*, 37 N. J. L. 201; *Cool v. Roche*, 20 Nebr. 550; *Munford v. Canty*, 50 Ill. 370; *Martin v. Hill*, 12 Barb. (N. Y.) 633; *Barker v. Stacy*, 25 Miss. 471; *Ryan v. Clanton*, 3 Strob. (S. Car.) 413; *Ferguson v. Clifford*, 37 N. H. 87; *Jones v. Taylor*, 30 Vt. 42; *Norris v. Sowles*, 57 Vt. 360.

But in Michigan this rule is not adopted, and the court holds differently from the current of authority. In that State, if mortgaged property is brought into its jurisdiction, the record of the mortgage in the other State is not notice to purchasers in Michigan.¹

§ 411. **Registration When Crop is to be Planted in Another County.**—Where a party living in North Carolina in one county made a mortgage covering a crop to be planted in another county, where he intended to move, and did move, the registration of the mortgage in the latter county is a valid recording, though the mortgagor did not remove until after the registration.²

§ 412. **When the Mortgagor Resides Out of the State.**—If the mortgagor resides out of the State, and the statute provides for the recording of the mortgage in the county of the mortgagor's residence, then the mortgagee must take possession of the mortgaged property, and continue in possession, or his lien will be lost.³ But if the statute provides that the mortgage shall, in case of the non-residence of the mortgagee, be recorded in the county where the property is situated, then the mortgage may be valid by recording in such county, and if there are several mortgagors, some of whom are non-residents, then it must be recorded in every county where the property is located.⁴

§ 413. **Notice to Subsequent Purchasers or Mortgagees.**—It is, in many States, held that a purchaser or mortgagee, with notice of an unrecorded mortgage, cannot take the property in good faith on his part, and his title will be subject to the equitable rights of the first mortgagee.⁵

¹ *Boydson v. Goodrich*, 49 Mich. 65.

² *Harris v. Jones*, 83 N. Car. 317.

³ *Smith v. Moore*, 11 N. H. 55.

⁴ *Decourcey v. Collins*, 21 N. J. Eq. 357.

⁵ *Gording v. Riley*, 50 N. H. 400; *Simons v. Pierce*, 16 Ohio St. 215; *Wetherell v. Spencer*, 3 Mich. 123; *Doyle v. Stevens*, 4 Mich. 87; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Tiffany v. Warren*, 37 Barb. (N. Y.) 571; *Gildersleeve v. Landon*, 73 N. Y. 609; *Hudson v. Warner*, 2 Har. & G. (Md.) 415; *Clark v. Tarbell*, 57 N. H. 328; *Nat. Bank v. Sprague*, 21 N. J. Eq. 530; *Williamson v. N. J. S. Railroad Co.*, 26 N. J. Eq. 398; *Allen v. McCalla*, 25

§ 414. **Under Statutes Making Unrecorded Mortgages Void.**—Some of the States make unrecorded mortgages void as to third parties; under such statutory provisions, such mortgages are ineffectual against subsequent purchasers and mortgagees, although they have actual notice.¹

§ 415. **In Illinois**, when the possession remains with the mortgagor, the mortgage must be acknowledged and entered in the justice's docket, and recorded; otherwise it will be invalid as to purchasers and creditors of the mortgagor, notwithstanding actual notice.²

Thus, where a chattel mortgage is acknowledged before a notary in the form proper to mortgages of real estate, it is void as to one *bona fide* taking the property in satisfaction of a debt, though he has actual notice of the alleged personal-property mortgage.³

§ 416. **In New York** it is held, under the statute, that notice of an unrecorded mortgage does not affect creditors, but does affect subsequent purchasers and mortgagees.⁴

§ 417. **In New Jersey**, purchasers and mortgagees, to be in position to avail themselves of an omission to record an antecedent mortgage, must have acted without notice of the rights of the antecedent mortgagee. But not so with a creditor. He may know of an antecedent mortgage, yet if not filed according to the statute, and he obtains a judgment and procures a levy to be made, his lien, by force of the statute, will take preference over the antecedent mortgagee's.⁵

Iowa 464; *Boyd v. Beck*, 29 Ala. 703; *Steele v. Adams*, 21 Ala. 534; *Coble v. Nonemaker*, 78 Pa. St. 501.

¹ *Travis v. Bishop*, 13 Met. (Mass.) 304; *Gassner v. Patterson*, 23 Cal. 299; *Donaldson v. Johnson*, 2 Chand. (Wis.) 160; *Sheldon v. Conner*, 48 Me. 584; *Bevans v. Bolton*, 31 Mo. 437; *Selking v. Hebel*, 1 Mo. App. 340; *Chenynworth v. Daily*, 7 Ind. 284; *Matlock v. Straughn*, 21 Ind. 128.

² *Forest v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Ill. 478; *Frank v. Minor*, 50 Ill. 444; *Sage v. Browning*, 51 Ill. 217; *McDowell v. Stewart*, 83 Ill. 538; *Lemon v. Robinson*, 59 Ill. 115.

³ *Long v. Cockern*, 128 Ill. 29.

⁴ *Farmers Loan and Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484; *Tiffany v. Warren*, 37 Barb. (N. Y.) 571; *Stevens v. B. & N. Y. R. R. Co.*, 31 Barb. (N. Y.) 590; *Thompson v. Van Vechten*, 27 N. Y. 568.

⁵ *Sayer v. Hewes*, 32 N. J. Eq. 652. See, also, *Williamson v. R. R. Co.*, 29 N. J. Eq. 311; *Nat. Bank v. Sprague*, 21 N. J. Eq. 530.

CHAPTER X.

INSTRUMENTS WITHIN THE STATUTES.

ARTICLE I.—INSTRUMENTS TO BE RECORDED.

- 418. Bills of Sale in the Nature of Chattel Mortgages.
- 419. Assignment of a Permit.
- 420. Instruments Purporting to be Bills of Sale—How Interpreted.
- 421. Separate Defeasance.
- 422. To Secure a Written Agreement.
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- 427. Mortgages Embracing Both Realty and Personality.
- 428. Mortgages of Rolling-Stock.
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- 431. Mortgages of Fixtures.
- 432. The Provisions of the Statute Must be Complied with.

§ 418. **Bills of Sale in the Nature of Chattel Mortgages.**—As a general rule, all instruments in the nature of chattel mortgages must be brought within the statute and filed or recorded. Thus, bills of sale which are intended to operate as chattel mortgages must be recorded. Even an absolute bill of sale, which the evidence shows was intended as a chattel mortgage, is void as against attaching creditors, unless filed in the proper office, or unless there was an actual delivery of the property and an actual and continued change of possession.¹

So, a bill of sale absolute in its terms, becomes a chattel mortgage upon proof by parol that it was intended to secure a debt. But a bill of sale, as such, is not entitled to record. A record of a bill of sale, not intended for a chattel mortgage, is an absolute nullity.²

Thus, under a contract, a vendee agreed to sell the goods

¹*Siedenbach v. Riley*, 111 N. Y. 560; *Bird v. Wilkinson*, 4 Leigh (Va.) 266; *Dukes v. Jones*, 6 Jones (N. C.) L. 14.

²*Nickling v. Betts Spring Co.*, 11 Oreg. 406.

and deliver to the vendor the notes received therefor, to be held as collateral security; this was an absolute sale and needed no registration.¹ A bill of sale of personal property in which there is a stipulation that the vendor shall remain in possession, is, if filed for record, notice to subsequent purchasers and to creditors.²

§ 419. **Assignment of a Permit.**—In Maine an assignment in a chattel mortgage of a permit to cut and remove timber, need not be recorded as a chattel mortgage, as far as cuttings are concerned, which are made after the assignment; otherwise as to cuttings made before the assignment. But an assignment which is not a sale, but a mortgage of logs already cut and hauled, should be recorded as against the creditors of the assignor, or as to subsequent vendees, unless possession is taken and kept by the mortgagee.

If, during the lumbering operation, a permittee mortgages his permit, which remains, and a portion of the timber has been then cut and hauled, as to that portion the mortgage needs to be recorded; as to the lumber afterwards to be cut, a registration of the mortgage is not necessary.³

§ 420. **Instruments Purporting to be Bills of Sale—How Interpreted.**—An instrument purporting to be a bill of sale must be considered a mortgage, if taken alone, or in connection with the surrounding circumstances, it appears to have been given as a security. The mere absence of terms of defeasance cannot determine whether it is a mortgage or not. If from the entire instrument, either standing alone or read in the light of the surrounding circumstances, it appears to have been given as a security, it must be construed as a mortgage, and the law will apply thereto the rules applicable to mortgages. Such an instrument being intended as a mortgage, must be filed for record when there is no immediate delivery of property to the mortgagee.⁴

¹ *Chemical Co. v. Johnson*, 98 N. Car. 123.

² *Kuhn v. Graves*, 9 Iowa 302. See, also, *Sanders v. Pefoon*, 4 Fla. 465; *Shaw v. Wilshire*, 65 Me. 485.

³ *Putnam v. White*, 76 Me. 551.

⁴ *Cooper v. Brock*, 41 Mich. 488.

Bills of exchange, for whatever purpose intended, need not be recorded if not mortgages.¹ But a bill of sale, absolute on its face, transferring property to be held only as security, is in effect a mortgage, and must be recorded,² and when there is any doubt, courts are inclined to construe the conveyances as mortgages.³

§ 421. **Separate Defeasance.**—When a mortgage is made by an absolute bill of sale and a separate defeasance, which is not recorded with the mortgage, as to third persons it is an absolute sale.⁴

When by statutory provisions it is declared that a bill of sale absolute appears by a separate defeasance to be intended for a mortgage, the mortgagee or vendee shall not have the benefit of recording it, unless the defeasance is recorded with it, does not apply to a deed absolute upon its face, although intended for a mortgage.⁵

§ 422. **To Secure a Written Agreement.**—Where a chattel mortgage is given to secure the performance of a written agreement, the agreement is no part of the mortgage and does not require to be filed with it in order to render the mortgage operative against third persons. Such an agreement is not part of the mortgage. The two instruments are separate and distinct contracts; as much so as a promissory note and mortgage. It is necessary to prove the agreement to give effect to the mortgage, but the law does not require the filing of the agreement to render it operative against third persons.⁶

Thus, a chattel mortgage was made with an agreement. The condition was as follows: "The said principal sum and interest to be paid immediately at the expiration of five years from date, excepting in case of default should be made

¹ *Knight v. Nichols*, 34 Me. 208.

² *Smith v. Beattie*, 31 N. Y. 542.

³ *Cornell v. Hall*, 22 Mich. 377; *Conway v. Alexander*, 7 Cr. (U. S.) 218.

⁴ *Gaither v. Munford*, Tayl. Term (N. C.) 167.

⁵ *Ing v. Brown*, 3 Md. Ch. 521.

⁶ *Byram v. Gordon*, 11 Mich. 531.

in the performance of the conditions of a certain agreement this day executed by," &c.

The agreement provided that it was to be paid in monthly installments of \$50 each. It was held that the mortgage was not invalid by the failure to record or file the agreement referred to.¹

§ 423. **Bills of Parcels.**—A mere receipted bill of parcels, in which no condition is expressed, but which the vendee named therein receives solely for the purpose of securing a debt due from the vendor, will be evidence of a pledge of which the pledgee may retain possession in order to make it available against creditors and subsequent purchasers. The pledgee must take possession if he would make good his rights against third persons.²

§ 424. **A Bill of Parcels is not a Chattel Mortgage.**—The record of a bill of parcels of chattels, taken as security for a debt, but without any delivery of the chattels, or a retention by the creditor, does not constitute it a mortgage or enable the creditor to recover the goods legally seized by third parties. Thus, a debtor gave to his creditor a bill of certain goods, intending it as security for the debt. It was in effect a common bill of parcels. The goods were not delivered to the creditor, and never came into his possession. The debtor went into bankruptcy January 6th, 1874, when his assignee took possession of the goods. The bill of parcels was recorded December 26th, 1873. It was held that the recording of the bill of parcels did not make it a mortgage nor answer the requirements of the law.³

§ 425. **Choses in Action.**—Recording of mortgages of personal property applies only to goods and chattels capable of delivery, and not to defeasible or conditional assignments of choses in action. Therefore, it is not necessary to the valid-

¹ *Shuler v. Boutwell*, 18 Hun (N. Y.) 171.

² *Shaw v. Wilshire*, 65 Me. 485; *Eastman v. Avery*, 23 Me. 248; *Ex parte Fitz*, 2 Low. D. C. 519; *Beeman v. Lawton*, 37 Me. 543; *Whitaker v. Sumner*, 20 Pick. (Mass.) 399.

³ *Williams v. Nichols*, 121 Mass. 435. See, also, *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Walker v. Staples*, 5 Allen (Mass.) 34.

ity of such assignment of a chose in action that it be recorded.¹ The capital stock of a corporation does not come under the recording acts as to goods and chattels, and hence a mortgage of such stock need not be recorded.² So, also, as to legacies, which are not chattels.³ Goods and chattels do not include choses in action under the recording acts. Thus, the assignment of a debt or a claim on another for money need not be recorded.⁴ Where a party agrees to cultivate land and to receive one-half of the crop as wages, it does not give him the control and possession of the crop; his interest being assigned as security is not necessarily a mortgage, and need not be recorded.⁵

§ 426. **Schedules.**—Where a schedule of articles mortgaged is referred to, as the means of identifying them, and is the only means afforded by the instrument, it is then essential to the validity of the instrument, and must be recorded with it. But when the instrument sufficiently identifies the property, and the reference to the schedule is for convenience, it need not be recorded.⁶

But when it is necessary, to identify the chattels, to refer to the schedule, then it must be recorded.⁷ Where the parties have given a more special description in the schedule, and have declared it to be a part of the mortgage, then it must be recorded as an essential part of the mortgage.⁸

§ 427. **Mortgages Embracing Both Realty and Personalty.**—

¹ *Marsh v. Woodbury*, 1 Met. (Mass.) 436; *Newby v. Hill*, 2 Met. (Ky.) 580; *Winsor v. McLelland*, 2 Story C. C. 492; *Putnam v. White*, 76 Me. 551; *Bacon v. Bonham*, 27 N. J. Eq. 209; *Monroe v. Hamilton*, 60 Ala. 226; *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 435; *Bank v. Huth*, 4 B. Mon. (Ky.) 448.

² *Williamson v. N. J. S. R. R. Co.*, 26 N. J. Eq. 398; *Rowland v. Plummer*, 50 Ala. 182.

³ *Bacon v. Bonham*, 27 N. J. Eq. 209.

⁴ *Kirkland v. Brune*, 31 Gratt. (Va.) 126; *Tingle v. Fisher*, 20 W. Va. 497.

⁵ *Hudgins v. Wood*, 72 N. Car. 256.

Words "goods and chattels," as used in the recording acts, do not include a mere chose in action, as a debt or claim of another for money due. *Tingle v. Fisher*, 20 W. Va. 497; *Bank v. Gettinger*, 3 W. Va. 317.

⁶ *Lund v. Fletcher*, 39 Ark. 325.

⁷ *Barkman v. Simmons*, 23 Ark. 1; *Chapin v. Cram*, 40 Me. 561.

⁸ *Sawyer v. Pennell*, 19 Me. 167.

A creditor at large of a mortgagor has no standing in court to have a chattel mortgage declared void on the ground of its not having been filed in the proper office. But, in New York, when a mortgage covering both real estate and personal property has not been filed in the proper office as a chattel mortgage, it is void as to the personalty against the claims of a creditor, arising since the making but before the filing of such mortgage.¹ But if it be the usage of the office to record chattel mortgages in the real estate record-book, a mortgage embracing both real and personal property may be recorded in this book and be valid as to third parties.²

§ 428. **Mortgages of Rolling-Stock.**—In April, 1876, an act of the legislature of New Jersey was passed providing that a mortgage of chattels of any railroad or canal company should be valid without being filed as a chattel mortgage. But this act does not apply to a case of a mortgage given before the passage of the act, as against a levy under an execution made prior to the passage of the act. But this is on the ground that, by the levy, the plaintiff in an execution had a vested right which was not divested by this act of 1876.³ But, except a lien or title was required by an incumbrancer or purchaser before the passage of the act, the act applies to a mortgage given before the act was passed, and the mortgagee is entitled to the benefit of the act accordingly. Hence, levies made and judgments recovered after the passage of the act are invalid as against the mortgage so given. But if the mortgagor buys other chattels after giving the mortgage, the mortgagee has no lien on them.⁴

In New York it is held that rolling-stock is subject to the act concerning the filing of mortgages on goods and chattels.⁵

But this question has been set at rest by a New York

¹ *Stewart v. Beale*, 7 Hun (N. Y.) 405; affirmed in 68 N. Y. 629.

² *Anthony v. Butler*, 13 Pet. (U. S.) 230.

³ *Williamson v. N. J. S. R. R. Co.*, 29 N. J. Eq. 311.

⁴ *Kelly v. Boylan*, 32 N. J. Eq. 581.

⁵ *Stevens v. B. & N. Y. R. R. Co.*, 31 Barb. (N. Y.) 590; *Bement v. P. & M. R. R. Co.*, 47 Barb. (N. Y.) 104; *Hoyle v. Plattsburgh & M. R. R. Co.*, 54 N. Y. 314.

statute, excepting from the operation of the Chattel Mortgage act mortgages by railroad companies on real and personal property which have been recorded as mortgages of real estate.¹

The New York act of 1876, relating to the registry of mortgages, provides that nothing in any of the laws of the State shall be held to require the filing of record of any mortgage given by any such corporation conveying the franchises and including chattels then or thereafter to be possessed and acquired, if such mortgage shall be duly lodged for registry as a conveyance of real estate.²

Where the question has been directly presented, whether the rolling-stock of a railroad company, included in a mortgage of its road-bed and franchises, is real or personal property, the current of authority is in favor of its being considered as personalty, and the mortgage must be filed as a chattel mortgage.³

In Virginia the statute provides that contracts concerning rolling-stock, cars, and the like, of railroad companies, are to be recorded in the county or corporation court of the county or corporation where the principal office of the company is located; if in Richmond city, in the Richmond Chancery Court.⁴

§ 429. **Doctrine of the United States Supreme Court.**—The constitution of 1870 of Illinois makes rolling-stock of railroads personal property. The United States Supreme Court decided that the statutory provisions in regard to chattel mortgages do not embrace mortgages by a railroad company, in connection with its real estate and franchises, of its personal property used and appropriated for railroad purposes.

¹ N. Y. Stat. 1868, ch. 779.

² N. Y. Laws of 1876, p. 307, § 4.

³ Chicago, &c., R. R. Co. v. Howard, 21 Wis. 44; Stevens v. B. & N. Y. R. Co., 31 Barb. (N. Y.) 590; Beardsley v. Ontario Bank, 31 Barb. (N. Y.) 619; Bement v. P. & M. R. R. Co., 47 Barb. (N. Y.) 104; Randall v. Elwell, 52 N. Y. 521; Hoyle v. Plattsburgh R. R. Co., 54 N. Y. 314; Coe v. Columbus R. R. Co., 10 Ohio St. 372; Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 56; State Treasurer v. S. & E. R. R. Co., 4 Dutch. (N. J.) 21; Ewell on Fixt. 39.

⁴ Code of 1887, § 2462.

The Illinois statute provides for the acknowledgment and record of the mortgage. The acknowledgment is required to be made before a justice of the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where he resides. These directions are wholly inapplicable to a railroad company whose line of road might pass through several justices' districts and extend through several counties; and if the statutes apply to mortgages of the railroad personalty, such mortgages would cease to be of any value after the expiration of two years from execution, "unless the mortgagee, before the expiration of that time, takes possession of it, the authority to do which, in advance of the maturity of the mortgage debt, and when there has been no default of the corporation in meeting its interest, would render the negotiation of the mortgage bonds difficult if not impossible. Clearly, the chattel mortgage statute has nothing to do with the present case."¹

¹ *Hammock v. Loan and Trust Co.*, 105 U. S. 77. The statute of Illinois, 1887, now allows a chattel mortgage to be renewed at the end of two years for another two years.

The provisions of the Illinois constitution of 1870, that the rolling-stock of a railroad company shall be deemed personal property, does not change the rule that a mortgage made by the company, covering all after-acquired property, includes such acquired rolling-stock, if obtained before the rights of execution creditors attach. *Scott v. Clinton and S. Railroad Co.*, 6 Biss. C. C. 529.

Whenever a mortgage is made by a railroad company to secure bonds, and the mortgage includes all present and after-acquired property, as soon as the property is acquired, the mortgage operates upon it. In this case it was the rolling-stock of a railroad company. *Pennock v. Coe*, 23 How. (U. S.) 117. See, also, *Dunham v. Railway Co.*, 1 Wall. (U. S.) 254; *Galveston Railroad Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Gevers v. Wright*, 18 N. J. Eq. 330; *Beall v. White*, 94 U. S. 382; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Railroad Co. v. Woelpper*, 64 Pa. St. 366; *Cowry v. P. & T. W. Railroad Co.*, 3 Phila. (Pa.) 173; *Railroad Co. v. James*, 6 Wall. (U. S.) 750.

A mortgage expressly covering the rolling-stock and other property pertaining to a railroad, was recorded as a mortgage on land, but not as a chattel mortgage, under the laws of Kansas. It was held that rolling-stock and other property, strictly appurtenant to the road, are a part of the road, and need not be recorded as a chattel mortgage, to give it priority over executions. *Farmers Loan and Trust Co. v. St. Joe, &c., Railroad Co.*, 3 Dill. C. C. 412. This does not show whether the registry was deemed sufficient on the ground that the rolling-stock was a fixture, or for the reason that, as a chattel, it was such property as not to come within the purview of the Kansas statute.

§ 430. **Chattels-Real Mortgages.**—The omission to file an instrument transferring a lease as a security, or the failure of the transferee to take possession of the lease, or of the premises, does not render the transfer void as to creditors or raise the presumption of fraudulent intent. The provisions of the statute have no application to leases of real estate. They are not usually the subject of a mortgage, and the provisions have no reference to this species of property.¹

§ 431. **Mortgages of Fixtures.**—The registration of a chattel mortgage is not necessary to pass the interest in machinery fixed to the soil, and comprehended in a mortgage of the realty, where it is the intention of the parties, as shown by the terms of the instrument, that the machinery should pass with and as a part of the freehold. Thus, in a conveyance by mortgage or otherwise of a factory, by any general name or description, with all of its machinery, fixtures and tools, such a factory, with all its machinery and fixtures and all necessary parts of the establishment, even slightly annexed, will pass with the freehold by such description.

Things ordinarily personal in their nature, adapted to be used with the real estate, fitted to it and necessary for its beneficial enjoyment in the character in which conveyed, will pass with the realty by such description, which would not pass by an ordinary conveyance of land with its appurtenances.²

In England the statute³ requires the registration, in a mode prescribed, of bills of sale of chattels, by mortgage or otherwise, as against creditors, the possession remaining in the vendor or mortgagor. It was held that registration, as a chattel mortgage, was not necessary to pass the interest in machinery fixed to the soil and comprehended in a mortgage of the realty, the intention of the parties, as shown by the

¹ *Booth v. Kehoe*, 71 N. Y. 341; *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474. See Section 210.

² *Potts v. N. J. Arms and Ordnance Co.*, 17 N. J. Eq. 395.

³ 17 and 18 Vic. ch. 36.

terms of the instrument, being that the machinery should pass with and as a part of the freehold.¹

In Massachusetts it was held, where the owner of a manufactory had mortgaged the building and the appurtenances for carrying on the same, which still remained in his possession, that certain fixtures which could not be taken out of the building without being first taken in pieces were liable to attachment at the suit of the creditors of the mortgagor, the court saying that the mortgagee of the building and privilege, not being in possession, had no possession of the machines, which were therefore liable for the debts of the mortgagor.²

§ 432. **The Provisions of the Statute Must be Complied With.**—In filing or having a mortgage recorded, the provisions of the statute must be complied with. Thus, in Illinois the law provides that the entry shall be made by a justice of the peace, or a police magistrate, upon the docket, of the acknowledgment, together with the names of the parties thereto, and description of the mortgaged property. This provision must be fully complied with, or the mortgage will be invalid as to third parties, unless the mortgagee takes possession of the property mortgaged. The original mortgage is required to be recorded, and a record of a copy will not be sufficient, and will be invalid as a mortgage as to third parties.³

¹ *Mather v. Fraser*, 2 Kay & Johns. 536; *Waterfall v. Penistone*, 6 El. & Black. 875. See, also, *Williamson v. N. J. S. R. R. Co.*, 29 N. J. Eq. 311; *Kelly v. Boylan*, 32 N. J. Eq. 581.

² *Gale v. Ward*, 14 Mass. 352.

³ *Porter v. Dement*, 35 Ill. 478. See, also, *Marsden v. Cornell*, 62 N. Y. 215.

ARTICLE II.—VALIDITY—WHAT LAW GOVERNS.

433. *Lex Loci Contractus*.434. *Lex Rei Sitæ*.435. *Lex Rei Sitæ—Lex Domicilii*.

436. A Mortgage Superior to an Assignment Made in Another State on the Same Day.

437. Comity Not Recognized in Some States—Louisiana Rule.

438. Pennsylvania Rule.

439. Michigan Rule.

440. Lien Cannot be Divested by Removal of Property from the State.

441. Comity May Apply to Corporations.

442. The Lien Will Remain Good.

443. *Lex Fori*—Remedies.

§ 433. *Lex Loci Contractus*.—The law of the place of contract governs as to the nature, validity, construction and effect of the mortgage. As a general rule, if a mortgage is good in the State where made, it will be good in any State to which the property may be removed. So, the removal of the mortgagor with the personal property to another county, will not affect the title of the mortgagee, nor his right to the possession for the purpose of paying his debt; and if the mortgage is valid where given, it will be valid in any State to which the property might be removed. Thus, a mortgage was recorded in the county in which the mortgagor resided, and imparted full notice to every one who is, or might become, interested. The removal to another county did not discharge the lien. Had the property been removed out of the State, the mortgage was not thereby invalidated.¹

In the absence of proof, it is the presumption that the law of another State given to the acknowledgment and recording of mortgages, deeds of trust, &c., is the same, or has the same effect, as that given by the law of the State where the

¹ Feurt v. Rowell, 62 Mo. 524, opinion by Wagner, J.; Smith v. Hutchins, 30 Mo. 380; Hall v. Pillow, 31 Ark. 32; Smith v. McLean, 24 Iowa 322; Bank v. Lee, 13 Pet. (U. S.) 107; Tylor v. Strang, 21 Barb. (N. Y.) 198; Blystone v. Burgett, 10 Ind. 28; Van Buskirk v. Hartford Ins. Co., 14 Conn. 588; Clark v. Tucker, 2 Sandf. (N. Y.) Ch. 157; Offutt v. Flagg, 10 N. H. 46; Ferguson v. Clifford, 37 N. H. 86; Cushman v. Luther, 53 N. H. 562; Ryan v. Clanton, 3 Strohn. (S. Car.) L. 411.

question is adjudicated.¹ Foreign mortgages which have been executed and recorded according to the laws of the place where made, are valid in another State.² Such instrument has the same force and effect to bind the property when removed to another State, and will be enforced there, as under the laws where executed. Possession by the mortgagor beyond the time stipulated, against the consent of the mortgagee, and in spite of his efforts to recover it, will not defeat his rights thereto.³ Thus, the validity of a mortgage executed in Georgia must be construed by the law of that State, and in the absence of proof it will be presumed, in Alabama or other jurisdictions, that the common law obtains there.⁴

So, a mortgage of personal property in Massachusetts, made in another State between two citizens of that State, and executed and recorded according to the laws of that State, is valid without delivery of the property, as against subsequent attaching creditors in Massachusetts, by a third citizen of that State.⁵ So, also, a chattel mortgage made by citizens of a State temporarily in another State with such property, if valid by the law of the place where made, is valid in the State of their residence, against creditors of the mortgagor, who afterwards find the property in his possession.⁶

In general, the laws of another State or country have no force outside of the State's jurisdiction, *ex proprio vigore*, but merely *ex comitate*; but the courts adhere to the rule that by the comity of nations, the *lex loci contractus* controls as to the validity and construction of personal contracts, though not as to the remedy and rules of evidence,⁷ nor where they

¹ Cox v. Morrow, 14 Ark. 603; Seaborn v. Henry, 30 Ark. 469; Sherrill v. Hopkins, 1 Cow. (N. Y.) 103; Legg v. Legg, 8 Mass. 99; Monroe v. Douglass, 1 Seld. (N. Y.) 447; Rape v. Heaton, 9 Wis. 328; Green v. Rugely, 23 Tex. 539; Smith v. Smith, 19 Grat. (Va.) 545.

² Barker v. Stacy, 25 Miss. 471.

³ Simms v. McKee, 25 Iowa 341.

⁴ Beall v. Williamson, 14 Ala. 55.

⁵ R. I. Bank v. Danforth, 14 Gray 123.

⁶ Langworthy v. Little, 12 Cush. (Mass.) 109.

⁷ Martin v. Hill, 12 Barb. (N. Y.) 631.

clash with the rights of citizens in another State where the contract is to be enforced, or the policy of its laws.¹ So, where a mortgage was executed in New Hampshire according to the law, and the mortgagor brought the property to Vermont, with the consent of the mortgagee, and used it for some months, it cannot be legally taken by attaching creditors of the mortgagor in Vermont. The mortgagee can maintain trespass against such attaching creditors for his damages. The mortgage being good in New Hampshire, was equally valid in Vermont.

Judge Peck says: "Where, in a case like the present, a right is claimed to attach personal property as the property of the former owner on the ground of non-compliance with a rule of policy adopted to prevent fraud, and hold it against a purchaser or mortgagee who had acquired a title in another jurisdiction, perfect against the creditors of the vendor or mortgagor by the law of the place of the contract, where no such rule of policy prevails, more difficulty arises. The cases on this subject are not entirely harmonious. * * * If this rule requiring a change of possession does not apply to such sales made out of the State, as held in these cases, it is immaterial at whose instance, or by whose consent, or for what purpose the property was afterwards brought into the State, or how long it had remained here after the sale or mortgage before the attachment. As Wooster never owned the property absolutely in this State, and made no transfer of it here, no change of possession was necessary here to perfect the title against creditors, which was already completed by the laws of New Hampshire."² This doctrine is illustrated in another case: At the time the mortgage was executed, two of the mortgagors and the mortgagee resided in Massachusetts, and the other mortgagor resided in Vermont. The mortgage was executed in Massachusetts, where the law required no change of possession. The property was there situated. The mortgage was afterwards foreclosed

¹ *Kanaga v. Taylor*, 7 Ohio St. 184.

² *Cobb v. Buswell*, 37 Vt. 337.

in Massachusetts. Afterwards the mortgagor, without the consent of the mortgagee, took the property into Vermont, and sold it to a third party, who paid a valuable consideration, without notice of any defect of title in the mortgagor. The court held that the purchaser acquired no title against the title of the mortgagee.¹

So, a chattel mortgage executed in New York by a citizen of that State, where the property had its visible locality at the time of the execution of the mortgage, and valid against creditors by the laws of New York without a change of possession, will protect the property from attachment in Vermont at the suit of a creditor of the mortgagor resident in the latter State, though found in the possession of the mortgagor.²

§ 434. *Lex Rei Sitæ*.—The rule that the title to movable property is to be judged of and determined by the *lex rei sitæ* has prominent application and adoption where personal property is seized under process issued from the courts of the State where the property is. In such cases the liability of the property to be seized and sold under such a writ must be determined by the law of that State, notwithstanding the domicile of all the claimants be another State.³ Thus, a party sold to another chattels. The sale being by way of security for a debt, was in effect a chattel mortgage. The sale was made in Maryland. The mortgagee resided in Maryland and the mortgagor in Pennsylvania. Then the mortgagor shipped the chattels, which were cattle, to New

¹ Taylor v. Boardman, 25 Vt. 581.

² Jones v. Taylor, 30 Vt. 42, overruling Skiff v. Solace, 23 Vt. 279, on this point under discussion.

In Alabama, if mortgaged property is brought into the State, the mortgage must be recorded within four months, to be valid against the rights of third persons. If mortgaged property is removed into another county from that in which the grantor resides, the mortgage must be recorded in the latter county within six months from the removal. Code, § 1814.

In Mississippi, if the mortgaged property is removed into another county, the mortgage must be recorded there within twelve months, in order to protect the title of the mortgagee. Rev. Code, § 1210 *et seq.*

³ Green v. Van Buskirk, 7 Wall. (U. S.) 139; Hervey v. R. I. Locomotive Works, 93 U. S. 664; Guilandier v. Howell, 35 N. Y. 657; Warner v. Jaffray, 96 N. Y. 248; Keller v. Paine, 107 N. Y. 83; Safe Co. v. Norton, 48 N. J. L. 410; Whart. Conf. Laws, §§ 340-349.

York in his own name, without the consent of the mortgagee, who at once saw the mortgagor and got an order for the delivery of the cattle to him. Then he sent an agent to New Jersey, who there received the possession of the cattle. Then, in the latter State, creditors of the mortgagor sued out an attachment and seized the cattle in New Jersey, as property of a non-resident debtor. By a statute of Maryland a bill of sale or mortgage, when the vendor or mortgagor remains in possession, is invalid as against creditors or purchasers from the vendor or mortgagor unless the bill of sale or mortgage be recorded.

No bill of sale or mortgage such as the statutes required was made; nor did the mortgagee obtain possession of the cattle in Maryland. In an action by the mortgagee against the sheriff for taking the cattle, it was held that the right of the sheriff to take the cattle, and the title acquired by his levy, are to be determined by the laws of New Jersey; that the last transaction between the mortgagor and mortgagee amounted to a contract of sale, and such a sale having been followed by delivery and possession in conformity with the Chattel Mortgage act of New Jersey,¹ the title of the mortgagee thereunder was valid as against the creditors of the mortgagor.²

The *lex rei sitæ* governs when a mortgage is executed in a State other than the one in which the property is situated.³ Thus, the chattel mortgage must be executed in compliance with the statute where the property is situated at the time. If a mortgage be executed in New York, where the parties reside, on property in Illinois, the validity is determined by the laws of the latter State.⁴ So, in New Hampshire, a mortgage of chattels located in that State, though executed according to

¹ Rev. Stat. p. 709, § 39; Supp. Rev. p. 491, § 11.

² Cronan v. Fox, 50 N. J. L. 417.

³ Hardaway v. Semmes, 38 Ala. 657; Rice v. Courtis, 32 Vt. 460; Martin v. Potter, 34 Vt. 87; Whitman v. Conner, 40 N. Y. Superior Ct. 339; Golden v. Cockril, 1 Kans. 259.

⁴ Green v. Van Buskirk, 7 Wall. (U. S.) 139, overruling S. C., 2 Keyes (N. Y.) 119.

the law of the domicile of the owner in another State, is invalid against creditors in New Hampshire who are citizens, unless the mortgage be recorded in the latter State in conformity with the laws.¹

§ 435. **Lex Rei Sitæ—Lex Domicilii.**—As a rule, personal property is governed by the law of the domicile of the owner, and not by the law of the *situs* of the chattels; but the assignment of personal property by way of a chattel mortgage, is an exception to the rule, and the *lex rei sitæ*, and not the *lex domicilii*, governs chattel mortgages.² Thus, a chattel mortgage executed and recorded in the State where the property is situated, will, if valid under the laws of the place of execution, be enforced by courts of the State where the property is afterwards brought by the mortgagor, unless there is some statute to the contrary.³

§ 436. **A Mortgage Superior to an Assignment Made in Another State on the Same Day.**—A mortgage valid by the laws of the place where executed is not invalidated by the mortgagor making an assignment on the same day in another State, valid by the laws of the latter State but not by the former State. These two transactions cannot be construed together as one transaction. The court, per Parker, C. J., says: "The assignment in Vermont appears to have been a valid instrument, according to the laws in existence there. The mortgage is valid by the laws of this State, where it was executed. The two instruments cannot be construed together as parts of the same transaction, so as to avoid the mortgage, upon the ground that the assignment is fraudulent as to creditors, and that the whole is therefore vicious. The assignment would have been invalid, if made here, to operate on property here, because it contains preferences not allowed by our statute. But it was not made here, and it cannot be rendered invalid by any constructive tacking of it to the

¹Clark v. Tarbell, 58 N. H. 88. Compare Runyon v. Groshon, 1 Beas. (N. J.) 86; Blystone v. Burgett, 10 Ind. 28.

²Ames Iron Co. v. Warren, 76 Ind. 512.

³Wilson v. Carson, 12 Md. 54; Jeter v. Fellowes, 32 Pa. St. 465.

mortgage. If that is good, it must remain so; because made in Vermont, it is not readily perceived upon what principle the mortgage, which is otherwise good, is to be avoided by construing it as a part of another transaction which is also legal and valid. If an entire transaction consists of several parts, and one part fails, the rest may fall with it; but the principle which governs such a case has no application in this.”¹

§ 437. **Comity Not Recognized in Some States.**—Comity is interstate courtesy, but there is no principle of comity that can give force to the law of one State to the prejudice of the rights of the citizens of another State, or in contravention of the policy of the other State. A State can adopt laws to protect its own property, as to regulate it, and no State will suffer the laws of another State to interfere with her own; and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the laws of its own country to that of strangers.²

Accordingly, in Louisiana, where a chattel mortgage is not known by her laws, it cannot be enforced in that State, where movables are not susceptible of being mortgaged. The court is not bound by the comity of nations to enforce a contract which, if made in this State, could not defeat the rights acquired by attachment under the law.³

Comity of nations and of States extends only to enforce obligations, contracts and rights under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises. Thus, a contract executed in England, by which a ship was transferred to a trustee to secure the rights of a third person, the vendor retaining the possession of the ship, cannot be enforced in Louisiana to defeat the rights already acquired under her law. *A vente a remere*, like another sale, is perfected as to third parties, in the case of movables, by delivery, and the

¹ *Morse v. Powers*, 17 N. H. 286.

² *Smith v. McAtee*, 92 Am. Dec. 645.

³ *Delop v. Windsor*, 26 La. Ann. 185.

vendee becomes the owner of the fruits, and the property absolutely, if it be not redeemed at the time stipulated.¹

§ 438. **Pennsylvania Rule.**—In this State it is held that a chattel mortgage which is made in another State, and valid there, might be enforced in Pennsylvania as between the parties, yet it would not be enforced as against a creditor or purchaser who had acquired rights in the property after it had been brought into the State. The laws of nations or States have not, *ex proprio vigore*, any binding force beyond the limits of their territory. Any effect they have is *ex comitate*. Thus, the courts of Pennsylvania will not hold that a chattel mortgage made in Maryland, shall be the means of curtailing the rights of citizens of their own State. While a lien created by the *lex loci contractus* will generally be enforced wherever the property may be found, yet this is not necessarily so in preference to claims arising under the *lex rei sitæ*. The comity extended to the *lex loci contractus* must yield to the positive law and public interest of the place where the remedy is sought.²

§ 439. **Michigan Rule.**—In this State it is held that laws for recording chattel mortgages can have no force beyond the jurisdiction of the sovereignty enacting them. Thus, the recording a chattel mortgage in Canada is therefore no notice to the creditors of the mortgagor who shall find the property in his possession in Michigan. Neither the statute of Canada nor of Michigan dispenses with the necessity of possession by the mortgagee, except where notice can be rendered effectual by recording the mortgage.³ So, also, where chattels are mortgaged in one State and left in the mortgagor's possession, and he then takes them into Michigan, the recording of the mortgage in the other State is not notice to purchasers.

Thus, where a mortgage has been duly executed and re-

¹ Hughes v. Klingender, 14 La. Ann. 845.

² McCabe v. Blymyre, 9 Phila. (Pa.) 615; Jeter v. Fellowes, 32 Pa. St. 465.

³ Montgomery v. Wight, 8 Mich. 143; Corbet v. Littlefield (Mich.), 47 N. W. Rep. 581.

corded in Indiana, and then the mortgagor, who retained possession of the property, removes it to Michigan and there sells it, the mortgagee has no remedy to recover the property from the purchaser, who is deemed a purchaser in good faith.

The court adopts *Montgomery v. Wright* as authority. The court, per Graves, C. J., says :

“The plaintiff allowed the mortgagor to retain possession and to appear to the world as one authorized to convey an unincumbered title, and no means of information were provided in this State to impeach this appearance. The defendant met him and publicly bought the property, and he not only had no notice of the plaintiff’s mortgage but was expressly told by Warren [the mortgagor] that no incumbrance existed. He paid a valuable consideration and nothing was wanting to give him the rights of a *bona fide* purchaser.

“It may be said that the consideration was inadequate, and in one sense that is true. The price was very far below the true value. But the buyer’s right, in such cases, to be protected does not require that he shall have paid the full value. The right to make good bargains is not invaded. It is the making of dishonest ones that the law reprobates. The question is not whether the consideration be adequate but whether it be valuable.”¹

§ 440. Lien Cannot Be Divested By Removal of Property From the State.—With citizens who live in the same State the mortgagee’s title cannot be divested by removal of the property from the State, without his assent or intervention and against his will, and by sale in another country under different laws. Thus, a party executed a chattel mortgage upon a span of horses, both parties being residents of the same State where the chattels were located. The mortgagor subsequently took them to Canada, where they were sold to the vendee, who took them in good faith. Under the laws of Canada, property cannot be reclaimed from one so pur-

¹ *Boydson v. Goodrich*, 49 Mich. 65.

chasing in market overt, without refunding to him the price paid. A resident of the same State as the parties to the mortgage bought the horses from the Canadian purchaser, but left the horses in Canada. The mortgagee brought action against the last purchaser for conversion, and it was decided that he could recover.

Folger, C. J., speaking for the court, says: "We doubt whether, in a case like this, where, after a title to property has been acquired by the law of the domicile of the vendor, and of the *situs* of the thing and of the forum in which the parties stand, in a contest between citizens of the State of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws. There are decisions that it has not, however. (See *Taylor v. Boardman*, 25 Vt. 581; *Martin v. Hill*, 12 Barb. 631; *French v. Hall*, 9 N. H. 137; *Langworthy v. Little*, 12 Cush. 109.) It is sought to distinguish these cases from that in hand, but they went upon a principle that is not inapplicable here. In them, as here, a right to movable property had been acquired in one State in a mode efficient thereto by its laws. The property had been taken into another State where the mode was not sufficient, by its law, to create a right. But the right acquired by that mode was upheld. In all these cases the property was taken away from under the laws which gave the right and placed under the operation of laws that denied the right. We perceive no difference in those cases from this we have, save that in those a creditor was seeking to recover his debt out of the property, *in invitum* the right thus acquired. Here there is a sale of the property between third parties despite the right. In those it was sought to take away the right by a public judicial sale. In this it is urged that the right has been destroyed by a private sale. By the laws of those States the creditors would have succeeded. So, here, the third parties would succeed by the law of Lower Canada. But in those

cases the law of the State where the right was acquired was recognized and force given to it in another State and under different law. Why should it not be in this case?"¹

Though a transfer of personal property, valid by the law of the domicile, is valid everywhere, as a general rule, there is to be excepted that territory in which it is situated, and where a different law has been set up, when it is necessary for the purpose of justice that the actual *situs* of the thing be examined.²

Yet the statutes of that land have no extra-territorial force, *ex proprio vigore*, though often permitted by comity to operate in another State for the promotion of justice, where neither the State nor its citizens will suffer any inconvenience from the application of them. The exercise of comity, in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case.³ But comity must not be carried so far as to permit a *bona fide* purchaser of stolen goods to claim them as against the original owner.⁴

§ 441. **Comity May Apply to Corporations.**—A mortgage of personal property given by a corporation in another State, need not be filed in the State where the property is subsequently brought. Thus, as a general rule, the law of the domicile of the owner of personal property determines the validity of the mortgage made by him. So, a mortgage being made in Connecticut, where the railroad was, and where the mortgage was executed, will be protected and upheld in New York.⁵

If a lien is good, notwithstanding it is unaccompanied by possession where the lien is created, it seems contrary to reason that the creditor should gain priority by proceeding

¹ *Edgerly v. Bush*, 81 N. Y. 199; and see *Cammell v. Sewell*, 5 H. & N. 728; *Grant v. M'Lachlin*, 4 Johns. (N. Y.) 84.

² *Green v. Van Buskirk*, 7 Wall. (U. S.) 139.

³ *Blanchard v. Russell*, 13 Mass. 1, opinion by Parker, C. J.

⁴ *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471, per Kent, C. J.

⁵ *Nichols v. Mase*, 25 Hun (N. Y.) 640.

in invitum in any other State to which the property may happen to be taken for temporary purposes.¹

Thus, the law of Illinois must govern as to the validity and effect of a mortgage made in that State, and if valid there it is valid and can be enforced in New York.² And in general, a voluntary conveyance of personal property can, by the law of the place where it is made, pass title wheresoever the property may be.³

§ 442. **The Lien Will Remain Good.**—If a lien on property is good, notwithstanding it is unaccompanied by possession of the mortgagee where the lien is created, the general rule is that the creditor shall not gain priority by proceedings *in invitum*, in any other State to which the property may happen to be taken for temporary purposes.⁴ Thus, the law of Illinois governs as to the validity and effect, and a chattel mortgage made in this State, if valid there, is valid and binding in New York.⁵

§ 443. **Lex Fori—Remedies.**—The remedies are regulated exclusively by the laws of the place where they are prosecuted. Thus, property mortgaged in Maine and subsequently brought into New Hampshire can only be attached and holden there, agreeably to the provisions of the New Hampshire laws.⁶ The mortgage will be presumed to have been executed in the State where it is sought to be enforced, until the contrary appears.⁷ Thus, where the mortgagee of a mortgage executed in the Indian Territory invokes the aid of the Arkansas courts to establish his rights thereunder, no presumption will be indulged as to the law in force in the Territory; but, in the absence of proof, the law of Arkansas

¹ *Martin v. Hill*, 12 Barb. (N. Y.) 631.

² *Ætna Ins. Co. v. Aldrich*, 26 N. Y. 92.

³ *Hoyt v. Thompson*, 19 N. Y. 207; and see *Jones v. Taylor*, 30 Vt. 42; *Ferguson v. Clifford*, 37 N. H. 36.

⁴ *Martin v. Hill*, 12 Barb. (N. Y.) 631.

⁵ *Ætna Ins. Co. v. Aldrich*, 26 N. Y. 92.

⁶ *Ferguson v. Clifford*, 37 N. H. 86; *McCabe v. Blymyre*, 9 Phila. (Pa.) 615.

⁷ *Shaw v. Wood*, 8 Ind. 518; *Hutchins v. Hanna*, 8 Ind. 533; *Franklin v. Thurston*, 8 Blackf. (Ind.) 160.

will be applied and justice will be administered according to its principles. The court, per Judge Hemingway, says that, as a rule, when rights arise in a particular country, they are to be determined by the laws of that country, and the party who would avail himself of them should prove them. "The mortgage in controversy was executed in the Indian Territory. No proof was offered of the laws in force there applicable to the matter, but it was agreed between the parties that there was no local Indian Territory law that was pertinent. This absence of proof cannot be supplied by presumption. In similar cases the courts of this State will generally presume the common law to be in force in another State. * * * But this presumption is indulged as to those States only that have taken the common law as a basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the States of Louisiana or Texas, because we know that their jurisprudence is founded upon a different system. The same reason forbids such a presumption as to the laws of the Indian Territory, for we know that no system of laws has been adopted there. But property rights are asserted there, and their existence universally recognized. They do not depend upon the uncertain tenure of possession, but rest upon a more substantial basis. As such rights are respected there, they should be enforced when they become involved in the courts of this State. There is no federal law on the subject. We have no proof of, and can indulge no presumption as to the local laws in force there. As the parties have invoked the aid of our courts, we must therefore apply our own laws and administer justice according to its principles."¹

It is the general rule that when a party relies upon the statute of another State, he must specially prove it. Hence, the statute of another State, upon which a mortgagee relies, must be specially proved, to be available to him.²

¹ *Garner v. Wright*, 52 Ark. 385. See, also, *The Scotland*, 105 U. S. 24.

² *Blystone v. Burgett*, 10 Ind. 28.

PART III.—LIENS CREATED BY MARINE MORTGAGES.

CHAPTER XI.
MARINE MORTGAGES.

ARTICLE I.—LAWS OF THE UNITED STATES.

- 444. Recording.
- 445. Applied Only to Vessels of the United States.
- 446. Vessels of the United States—Definition.
- 447. Requisites for Recording.
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- 462. Construction.
- 463. Equitable Mortgages.
- 464. Parol Evidence.
- 465. Secondary Evidence.

§ 444. **Recording.**—In giving mortgages upon ships and vessels, the laws of the United States must be considered, and form an important factor in determining the rights of parties. The statute for recording is as follows: “No bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by

bottomry on any vessel, created during her voyage, by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section.”¹

§ 445. **Applies Only to Vessels of the United States.**—The law applies only to vessels of the United States, and hence does not include vessels which have not been registered or enrolled,² and in such case the priority of conflicting liens on such vessels depends entirely on the State laws.³

When a vessel which has been enrolled is sold to a party residing in another port, she must be newly registered and enrolled, as required by statute, or she will cease to be a vessel of the United States, and a subsequent mortgage acquires no validity by being recorded under the United States statute.⁴

§ 446. **Vessels of the United States—Definition.**—Vessels of the United States are those which have been built in the United States and belong wholly to citizens of this country, and which have been registered as required by statute;⁵ if coasting vessels, those which have been enrolled and licensed as such.⁶ A canal boat or a scow is not a vessel of the United States, within the meaning of the act relating to the recording of mortgages.⁷ Nor is a pleasure yacht a vessel of the United States, within the meaning of the recording act.⁸

¹ U. S. Rev. Stat. § 4192; formerly act of July 29th, 1850, § 1; 9 Stat. § 440. Directions for making and keeping such record, with indexes, and for furnishing certified copies thereof. Rev. Stat. §§ 4193–4195.

² *Veazie v. Somerby*, 5 Allen (Mass.) 280; *Thurber v. The Fanny*, 8 Ben. D. C. 429; *Best v. Staple*, 61 N. Y. 71; *Perkins v. Emerson*, 59 Me. 319; *Foster v. Perkins*, 42 Me. 168; *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

³ *Foster v. Perkins*, 42 Me. 168.

⁴ *Johnson v. Merrill*, 122 Mass. 153.

⁵ Act of Congress, December 31st, 1792, § 1.

⁶ Act of Congress, February 18th, 1793, § 1.

⁷ *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

⁸ *Veazie v. Somerby*, 5 Allen (Mass.) 280.

In an action to contest the validity of a coasting vessel, the mortgagee must show that she was both enrolled and licensed; that she was a vessel of the United States. A judgment creditor or purchaser is not concluded because the mortgage was recorded in the custom-house. *Best v. Staple*, 61 N. Y. 71; *Davidson v. Gorham*, 6 Cal. 343; *Perkins v. Emerson*, 59 Me. 319; *Stinson v. Minor*, 34 Ind. 89.

§ 447. **Requisites for Recording.**—"No bill of sale, mortgage, hypothecation, conveyance or discharge of mortgage or other incumbrance of any vessel shall be recorded unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgments of deeds."¹

§ 448. **Necessity of Acknowledgment.**—Acknowledgment of a mortgage of a vessel is necessary, under the statute, for the purpose of authenticating it for record; as between the parties or as against persons having actual notice it is valid without acknowledgment.²

§ 449. **Between the Parties.**—As between the parties and as against persons having actual notice a mortgage of a vessel is good without acknowledgment and record. Waite, C. J., said: "To our minds there is no doubt that congress only intended that a mortgage of a vessel shall be acknowledged for the purpose of authenticating it for record, and that as between the parties and as against persons having actual notice thereof, it was valid without acknowledgment or record."³

§ 450. **Validity.**—Under the United States statute relating to the enrollment of ships and vessels it is not required, to make a sale of a vessel valid, that it shall be enrolled in the custom-house. The enrollment seems not to be necessary by the law to make the title valid, but to entitle the vessel to the character and privileges of an American vessel.⁴

The recording of a mortgage of a vessel in the office of the collector of the home port of such vessel, says Justice Nelson, gives the mortgagee preference over a subsequent purchaser or mortgagee, by its own force, and irrespective of any for-

¹ U. S. Rev. Stat. § 4193; 13 Stat. 519.

² *Moore v. Simonds*, 100 U. S. 145; *The John T. Moore*, 3 Woods C. C. 61; 7 Ins. L. J. 207; 23 Int. Rev. Rec. 295.

³ *Moore v. Simonds*, 100 U. S. 145. See, also, *Hobbs v. The Interchange*, 1 W. Va. 57; *Best v. Staples*, 61 N. Y. 71; *Cape Fear Steamboat Co. v. Conner*, 3 Rich. (S. Car.) 335; *Merrick v. Avery*, 14 Ark. 370; *Parker Mills v. Jacot*, 8 Bosw. (N. Y.) 161.

⁴ *Hozey v. Buchanan*, 16 Pet. (U. S.) 215.

malities required by a State statute, to give effect to chattel mortgages.¹

The filing of a chattel mortgage on a vessel under the State law, regarded as a notice, does not affect third parties, unless the owner continues to reside in the State.² A mortgage of a vessel is valid though not recorded till the assignee of the owners, after their going into insolvency, receives an assignment of their property and gives public notice thereof.³

§ 451. **Application of State Statutes.**—The act of congress⁴ in reference to the recording of mortgages upon enrolled and licensed vessels supersedes the statutes of the States providing for the recording of mortgages in the office of the register of the county or township, and no presumption of fraud which would arise under the State law because of the failure to so record them, can prevail against their validity.⁵

Accordingly, a general assignment for the benefit of creditors, covering enrolled and licensed vessels belonging to the assignor, which is not recorded in the office of the collector of customs where such vessels are registered or enrolled, gives the assignee no right to the vessels as against a mortgagee whose mortgage is thus enrolled.⁶

But where a vessel has never been enrolled or registered in compliance with the United States law, a mortgage given on such vessel must be recorded in accordance with the statute of the State relating to chattel mortgages where the

¹ *White's Bank v. Smith*, 7 Wall. (U. S.) 646; *Aldrich v. Aetna Co.*, 8 Wall. (U. S.) 491, overruling, in part, *Thompson v. Van Vechten*, 5 Abb. (N. Y.) Pr. 458; *Best v. Staple*, 61 N. Y. 71; *Folger v. Weber*, 16 Hun (N. Y.) 512; *Cunningham v. Tucker*, 14 Fla. 251; *Robinson v. Rice*, 3 Mich. 235; *Wood v. Stockwell*, 55 Me. 76; *Fontaine v. Beers*, 19 Ala. 722; *Shaw v. McCandless*, 36 Miss. 296; *The Grace Greenwood*, 2 Biss. C. C. 131. See *Stinson v. Minor*, 34 Ind. 89.

² *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38.

³ *Leland v. The Medora*, 2 Woodb. & M. C. C. 92.

⁴ Rev. Stat. § 4192.

⁵ *Robinson v. Rice*, 3 Mich. 235; *Banks v. Smith*, 7 Wall. (U. S.) 646; *Aldrich v. Aetna Co.*, 8 Wall. (U. S.) 491; *Best v. Staples*, 61 N. Y. 71; *Perkins v. Emerson*, 59 Me. 319; *Fontaine v. Beers*, 19 Ala. 722.

⁶ *Haug v. Bank*, 77 Mich. 474.

vessel is at the time of the execution of the mortgage.¹ However, such mortgages are not superior to those taken subsequently and after the vessel is enrolled or registered.²

§ 452. **The Provisions of the Statute Concerning Recording Are Constitutional.**—The provisions concerning the registry of vessels,³ requiring the recording of all mortgages, hypothecations and conveyances of any vessel in the office of the collector where such vessel is enrolled or registered, are constitutional and valid.⁴

§ 453. **Place of Record.**—The collector's office at the home port is the proper place for the registry of all conveyances of vessels within the meaning of the act providing for the recording of such instruments. Judge Clifford says that permanent registry is required to be made at the home port of the vessel, and what is meant by the home port is clearly and plainly defined; that the name of the ship or vessel and of the port to which she shall belong shall be painted on her stern. All persons interested, therefore, have the means of ascertaining the name of the vessel and her home port; and her shipping papers, which include a copy of her register or enrollment, are by law required to furnish the same information.

Whether sailing under the permanent register, issued from the office of the collector of the home port, or under a temporary document issued from the office of the collector of some other district in the course of the voyage, every ship or vessel bears upon her stem the name of the port to which she belongs. Registry of bills of sale of ships or vessels surely need not be recorded in more than one office, "and the unbroken practice for seventy years points to the office of the collector of the home port as the proper place for

¹ *Veazie v. Somerby*, 5 Allen (Mass.) 280.

² *Perkins v. Emerson*, 59 Me. 319. Compare *Foster v. Perkins*, 42 Me. 168; *Goodenow v. Dunn*, 21 Me. 86; *Bonsey v. Amee*, 8 Pick. (Mass.) 236.

³ Rev. Stat. §§ 4192-4195.

⁴ *United States v. The Victoria Perez*, 8 Ben. D. C. 109.

such registry, and, consequently, as the one contemplated by the act of congress."¹

§ 454. **Ships at Sea.**—Ships and goods at sea have sometimes been considered as exceptions to the general rule of recording; in regard to which, delivery of the muniments of title is allowed to be sufficient till actual possession can be taken, which must be done when it becomes practicable, or the conveyance will be void against creditors.²

And a bill of sale, as held by Judge Story, at common law, of a ship, by way of mortgage, is good as against creditors, if, by the terms of the agreement, the mortgagor is to sail her on a voyage then begun.³

A sale of a vessel at sea forfeits her national character unless the vendee obtains a new registry within three days after her arrival in a port of the United States.⁴

§ 455. **Effect of Recording.**—The recording or non-recording of the conveyance of a vessel only affects the question of the priority of liens on the vessel. It does not affect the question of the personal liability of the owner for supplies furnished. Judge Nelson says recording acts relate to conflicting interests, and liens acquired in and upon lands and chattels, and are designed to regulate the same. Thus, if material-men have a valid lien upon the vessel for stores furnished, a previous unrecorded conveyance by the master would be postponed, but the recording of an instrument has nothing to do with the personal liability of the owner of the vessel. It is important when the question relates to an interest or claim upon the vessel itself, but not otherwise.⁵

¹ *Blanchard v. The Martha Washington*, 1 Cliff. C. C. 463. See, also, *The John T. Moore*, 3 Woods C. C. 61; 7 Ins. L. J. 207; 23 Int. Rev. Rec. 295; *Hays v. Pac. Mail Steamboat Co.*, 17 How. (U. S.) 596; *Johnson v. Merrill*, 122 Mass. 153; *White's Bank v. Smith*, 7 Wall. (U. S.) 646, overruling *Potter v. Irish*, 10 Gray (Mass.) 416; *Chadwick v. Baker*, 54 Me. 9, which holds that the registry should be made in the district of the last registry.

² *Goodenow v. Dunn*, 21 Me. 86; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Portland Bank v. Stubbs*, 6 Mass. 422.

³ *D'Wolf v. Harris*, 4 Mas. C. C. 515; *Winsor v. McLelland*, 2 Story C. C. 492.

⁴ U. S. Rev. Stat. § 4166.

⁵ *Mott v. Ruckman*, 3 Blatchf. C. C. 71.

So, where the master of a vessel, who is her charterer for a specific term, under a charter-party which provides that he shall furnish her with all requisite stores, purchases supplies for her, the master and not the owner is exclusively responsible for the supplies.¹

§ 456. **When the United States Statute Applies.**—The statute² requiring any conveyance or mortgage of a vessel of the United States to be recorded does not apply to a vessel which has never been enrolled or registered.³ Charter-parties need not be registered like conveyances of vessels. The only effect of recording is to give notice of its existence. The act providing for recording of conveyances does not extend to charter-parties; and the instruments which the act requires to be recorded are not declared invalid as to those having actual notice thereof.⁴

§ 457. **Bill of Sale as a Mortgage.**—An instrument, purporting to be a bill of sale of a vessel, and in its terms absolute, may be proven by parol to be only a mortgage. The facts that the bill of sale was recorded; that the vessel was enrolled again in the name of the transferee; that a policy of insurance was taken out in his name as owner, and that no note or bond was taken by him, will not overcome positive evidence that the bill was taken as a mere security for a loan.⁵ An agent or broker who purchases a vessel for his principal, at the same time lending him money with which to pay the price, and taking the bill of sale in his own name to secure the payment of the loan and interest, together with the commissions on the purchase, is mortgagee and not owner of the vessel.⁶

§ 458. **Change of Possession.**—A mortgage of a vessel, unless accompanied by possession in the mortgagee, is void

¹ *Frazer v. Marsh*, 13 East 128; *Webb v. Peirce*, 1 Curt. C. C. 104.

² U. S. Rev. Stat. § 4192.

³ *Thurber v. The Fanny*, 8 Ben. D. C. 429.

⁴ *Hill v. The Golden Gate*, 5 Am. Law Reg. 142.

⁵ *Morgan v. Shinn*, 15 Wall. (U. S.) 105.

⁶ *The Panama*, Olcott D. C. 343.

as to subsequent *bona fide* purchasers for a valuable consideration.¹

The mortgagee out of possession is never considered the owner, and consequently cannot be held liable for repairs done or supplies furnished to the vessel.² But the legal title and the right to immediate possession of the vessel mortgaged are vested in the mortgagee.³ And his possession, to entitle him to a lien on the freight, must be such as to terminate that of the mortgagor.⁴

§ 459. **Fraudulent Mortgage.**—Where the title to an American-built vessel, owned and controlled in the United States, was conveyed to a nominal British owner, the vessel being navigated under the British flag, and a mortgage of the vessel was given by the fictitious owner to a mortgagee having notice of the facts, to secure sums loaned by him to the real owner, it was decided that such a conveyance was a fraud upon the laws of England, and that the mortgagee was not entitled to the proceeds of the vessel libeled and sold to satisfy advances subsequently made by an innocent third person.⁵

§ 460. **Substitution.**—A mortgagor of a ship in possession, with the consent of the mortgagee, is authorized to make any change, addition or repairs thereon necessary and convenient for her preservation and use as a ship, provided that he does not willfully depreciate her value as a security to the mortgagee. The old material displaced by the new may be disposed of by the mortgagor as his property, unaffected by the mortgage. But if the material is left on board and passes into the possession of the mortgagee with the vessel, and is capable of being used in some form in its ordinary navigation, it would still be within the operation of the mortgage and belong to the mortgagee. But, says Judge

¹ The *Romp*, Olcott D. C. 196.

² *Fox v. Holt*, 4 Ben. D. C. 278.

³ The *J. B. Lunt*, 11 N. Y. Leg. Obs. 137.

⁴ The *Wexford*, 7 Fed. Rep. 674, opinion by Judge Choate.

⁵ *Da Herrera v. The Acme*, 7 Int. Rev. Rec. 149.

Deadly, if the old material is not suited for use in the navigation of the vessel, the fact that the mortgagor allowed it to remain on board does not show that he did not intend to withdraw it from the operation of the mortgage, and appropriate it in exchange for the new material put in its place.¹

§ 461. **Jurisdiction of a Court of Admiralty.**—A court of admiralty has no jurisdiction of a libel which seeks to have a bill of sale of a vessel navigating the lakes declared a mortgage, and to have a decree requiring the respondent to reconvey the vessel to the libellant, if, upon an accounting, it should be found that the indebtedness which was secured by the conveyance of the vessel had been fully satisfied.²

A mortgage of a vessel to secure the purchase-money is not a maritime contract, as held by Judge Acheson, and a court of admiralty will neither decree a foreclosure thereof nor enforce the mortgagee's right of possession under it.³

The mortgages of ships are to be enforced like other chattel mortgages; they are contracts without any of the characteristics of a maritime loan.⁴

§ 462. **Construction.**—A deposit of a bill of sale of a vessel, with a power of attorney to sell her, as security for advances of purchase-money, does not constitute a mortgage. The creditor takes only a naked power, without any present conveyance of the property in the mortgage.⁵ But if he had advanced the purchase-money and taken a bill of sale in his own name as security, he will then be considered a mortgagee.⁶

§ 463. **Equitable Mortgages.**—An indorsement on a ship's register at the time of the sale, that "the vessel should not be sold until the notes given for the purchase-money are paid," will be construed as an equitable mortgage, if it be

¹ *The Canada*, 7 Sawyer C. C. 180.

² *Bullen v. The C. C. Trowbridge*, 29 Int. Rev. Rec. 102.

³ *Britton v. The Venture*, 21 Fed. Rep. 928.

⁴ *Bogart v. The John Jay*, 17 How. (U. S.) 399.

⁵ *The Perseverance*, Blatchf. & H. D. C. 385.

⁶ *The Panama*, Olcott D. C. 343.

duly recorded as such.¹ So, a bond, which is insufficient as a bottomry bond, may be good as a mortgage if it be duly recorded as a mortgage.²

§ 464. **Parol Evidence.**—A bill of sale of a vessel absolute in its terms, like a bill of sale on any other chattel, may be shown by parol evidence to be only a mortgage. But if trust and confidence have been reposed in the transaction by innocent third parties, with the belief that the sale was indefeasible, and such parties have been misled by its form, then they have a right to insist that, as to them, it shall be what, upon its face, it purports to be.³

§ 465. **Secondary Evidence.**—Secondary evidence may be given of a lost mortgage. Thus, the testimony of the owner of a vessel that on a certain day he mortgaged the vessel to a certain person for a particular sum, together with a memorandum upon his registry of such a mortgage, is competent to prove that there was a mortgage of the vessel, and, in connection with testimony of the sole executor of the mortgagee, that, on careful search, he could not find the original instrument among his testator's papers to prove what were its contents.⁴ When the source of original evidence is exhausted, and resort is properly had to secondary proof, the contents of writings may be proved like any other fact, by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon comparative weight or value of one or other form of proof. The jury will judge of its weight, and may give due consideration to the fact that a less satisfactory form of proof is offered, while a more satisfactory one exists and is withheld.⁵

¹ *Welsh v. Usher*, 2 Hill (S. Car.) Ch. 167.

² *Greely v. Smith*, 3 Woodb. & M. C. C. 236.

³ *Morgan v. Shinn*, 15 Wall. (U. S.) 105.

⁴ *Atherton v. Ins. Co.*, 109 Mass. 32.

⁵ *Goodrich v. Weston*, 102 Mass. 362.

ARTICLE II.—PRIORITIES.

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- 471. Lien of Material-Men.
- 472. Contrary Doctrine.
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- 474. The Master the Agent of the Mortgagee.
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- 482. When the United States Statute Does Not Apply to Domestic Vessels.
- 483. A Domestic Vessel—Definition.
- 484. State Courts Can Enforce the Liens Created by State Laws, for Supplies and Repairs.
- 485. Valid Laws of Congress Must Prevail.

§ 466. **Mortgage and Other Liens.**—Though a mortgagee has a valid mortgage, the law makes it inferior to strictly maritime liens, and to a valid bottomry bond, whether the bond be given antecedently or subsequently to the mortgage.¹ Thus, the holder of a bill of lading has a remedy in admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel *in rem*, where goods shipped on board are not delivered.²

§ 467. **Construction.**—In November, 1882, the owner of a vessel in Connecticut gave a bill of sale of her in the nature of a mortgage, but remained in possession and acted as absolute owner; her register and all her papers remained unaltered. In July following he gave a bottomry bond for money advanced to purchase a cargo for the vessel in the West Indies, without notice to the lender on the mortgage.

¹ *Baldwin v. The Bradish Johnson*, 3 Woods C. C. 582; *The Feronia*, 2 Adm. & E. 65; *The Mary Ann*, 1 Adm. & E. 8; *The Royal Arch*, Swab. 259; *The Heligoland*, Swab. 491; *The Duke of Bedford*, 2 Hagg. 294.

² *Furniss v. The Magoun*, Olcott D. C. 55. See *The Mary*, 1 Paine C. C. 671.

It was decided that upon the principles of the common law, as well as on those of equity, the claim of the lender was to be preferred to the mortgagee.¹

§ 468. **Seamen's Wages.**—As between conflicting liens of claimants, Judge Blodgett says seamen's wages precede towage charges; the latter are entitled to priority over mortgages and home-port supply claims.²

The wages of the last voyage have precedence over all earlier liens and incumbrances, when these exceed her full value. Under these circumstances the party who pays the wages may be subrogated to the rank of the seamen, on the ground that he has saved expense.³

§ 469. **Towage Charges.**—Towage charges are entitled to priority over mortgages, and home-port supplies, though the mortgage had been duly recorded under the United States law prior to the incurring of the debt for towage charges.

This case was first brought in the United States District Court for the Northern District of Illinois by the plaintiff against *The Mystic*, in 1886, for seamen's wages. The claim was allowed and the vessel ordered sold. The Dunham Towing Co. and a mortgagee then brought suit against the proceeds. The towage claim was \$199, and the other \$1,607, secured by a legally-recorded mortgage executed prior to the incurring of the debt for towage. There was not enough money to pay both claims, and the question of priority arose. The District Court decided that the towage bill was entitled to priority over the mortgage.⁴ This case was examined by Chief Justice Fuller when he was holding court in Chicago, June, 1890, and he said he would sustain the doctrine announced; however, the case was not actually appealed, and no decree was entered.

¹ *The Mary*, 1 Paine C. C. 671.

² *Bishop v. The Mystic*, 30 Fed. Rep. 73; *The City of Tawas*, 3 Fed. Rep. 170; *The John T. Moore*, 3 Woods C. C. 61; *Miller v. The Alice Getty*, 9 Chi. Leg. News 315; *The Island City*, 1 Low. D. C. 375.

³ *The J. A. Brown*, 2 Low. D. C. 464.

⁴ *Bishop v. The Mystic*, 30 Fed. Rep. 73. Judge Blodgett does not understand that this case overrules *The Grace Greenwood*, 2 Biss. C. C. 131.

§ 470. **Liens Contracted in a Foreign Port.**—A note given by a master in a foreign port, by the owner's consent, for necessary supplies, pledging the vessel for the payment ten days after completion of her voyage, as Judge Brown holds, is a valid bottomry lien, and outranks a prior mortgage.¹ And liens for necessary repairs or supplies in a foreign port, contracted for by the master, take priority over a valid antecedent mortgage.²

§ 471. **Lien of Material-Men.**—A lien of a material-man for supplies and repairs furnished in a home port, given by a State statute, is entitled to priority over a mortgage on a vessel for repairs, although, says Judge Seymour, such mortgage had been duly recorded before such supplies and repairs were furnished.³

If the lien be maritime it must stand on an equality with other maritime liens of the same class, and be preferred to a mortgage, even of earlier date; the latter not being maritime in its nature. The character of a lien depends upon the nature of the contract. A contract to supply or repair a vessel, wherever made, is, by the law of nations, a maritime contract. The lien of a material-man for supplies and repairs in a foreign port has precedence over a mortgage, because it is a maritime lien. When, by statute, a lien is given for repairing in a home port, the subject of the contract being the same, and the remedy being made the same, it must have the same precedence.⁴

¹ *Bolten v. The Jones L. Pendergast*, 30 Fed. Rep. 717.

² *Fox v. Holt*, 36 Conn. 558. See, also, *The Emily Souder*, 17 Wall. (U. S.) 666; *The Acme*, 7 Blatchf. C. C. 366.

³ *Clyde v. Steam Transfer Co.*, 36 Fed. Rep. 501; *The John Farren*, 14 Blatchf. C. C. 24; *The Kingston*, 23 Fed. Rep. 200; *The Venture*, 26 Fed. Rep. 285; *The Gen. Burnside*, 3 Fed. Rep. 228; *The Guiding Star*, 18 Fed. Rep. 263; *Jones v. Keen*, 115 Mass. 170; *The Norfolk and Union*, 2 Hughes C. C. 123; *Hatton v. The Melita*, 3 Hughes C. C. 494; *Reeder v. The George Creek*, 3 Hughes C. C. 584; *The Hiawatha*, 5 Saw. C. C. 160; *The Wm. T. Graves*, 8 Ben. D. C. 568; *The Granite State*, 1 Sprague C. C. 277.

⁴ *Clyde v. Steamboat Transfer Co.*, 36 Fed. Rep. 501. See, also, *Kellogg v. Brennan*, 14 Ohio 72; *Provost v. Wilcox*, 17 Ohio 359; *Donnell v. The Starlight*, 103 Mass. 227; *The Hull of a New Ship*, 2 Ware D. C. 203; *The Emily Souder*, 17 Wall. (U. S.) 666; *The Acme*, 7 Blatchf. C. C. 366; *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38; *The Pacific*, Brow. & L. 243; *The Scio*, L. R., 1 A. & E. 353.

§ 472. **Contrary Doctrine.**—There are many courts which hold a contrary doctrine. They hold that the lien of a mortgage on a vessel, duly recorded according to the United States statute, Section 4192, is inferior to all strictly maritime liens; but, as Chief Justice Pardee says, is superior to any subsequent lien for supplies furnished in the home port, given by State statute.¹

§ 473. **Liens of Collisions and Affreightments.**—Chattel mortgages are inferior to liens of collisions,² or liens of affreightment. Thus, the libelants held a bill of lading, executed by the master during the voyage, for specie shipped on board and never delivered, and it was held that their lien was superior to that of a mortgage. Judge Betts said that the principle is not changed by the fact that the foundation of the mortgage was a debt of a maritime character accruing for labor and materials furnished by the mortgagee to the vessel.

“It is clear that if the vessel had gone into the possession of the mortgagee under that incumbrance, and had afterward taken on board the shipment in question, she would have been subject to the lien for its full value, and there is no legal reason for securing them a privilege against this charge,” when left in the hands of the mortgagor, superior to that they could claim if placed in the hands of the mortgagee.³

§ 474. **The Master the Agent of the Mortgagee.**—A master may subject a vessel to his contracts which take precedence over a chattel mortgage. The master is, *pro hac vice*, the agent of the mortgagee.⁴

§ 475. **Mortgagor's Authority in Possession to Contract.**—

¹The *De Smet*, 10 Fed. Rep. 483; The *Josephine Spangler*, 11 Fed. Rep. 440; The *Kate Hinchman*, 7 Biss. C. C. 238; *Scott's Case*, 1 Abb. (U. S.) 336; The *Hine v. Trevor*, 4 Wall. (U. S.) 555; *Ballard v. Wiltshire*, 28 Ind. 341; *Stewart v. Harry*, 3 Bush (Ky.) 438; *Griswold v. The Otter*, 12 Minn. 465; *The General Buell v. Long*, 18 Ohio St. 521; *In re The Josephine*, 39 N. Y. 19.

²The *Alice*, 1 W. Rob. 111.

³*Justi Pon v. The Arbustci*, 6 Am. L. Reg. 511.

⁴The *E. M. McChesney*, 8 Ben. D. C. 150; 15 Blatchf. C. C. 183.

When the mortgagee allows the mortgagor to retain possession of the vessel, although it is duly recorded at the custom-house where the vessel is registered or enrolled, the mortgage is postponed to liens subsequently incurred in the course of the employment of the vessel, such as maritime liens,¹ or liens under the State law. Thus, when the local law gives a lien for supplies furnished to a vessel in her home port, and provides that such lien shall be preferred to that of a mortgage, a court of admiralty will enforce it accordingly. Judge Deady holds that such a lien will be so enforced by a court of admiralty when the local law is silent on the subject, upon the grounds that the lien of a maritime contract, whether it arises under the local law or the maritime law, is practically a maritime lien, and must be preferred to that of a mortgage.² But apart from the State law, upon general principles, the lien of the material-man must be preferred to that of a prior recorded mortgage.

"A mortgagor in possession represents the mortgagee, and in contracting debts for necessities is, therefore, authorized to bind his interest in the vessel for their payment, so far as the law gives a lien therefor. In this respect there is an implied agency between them. Necessaries supplied the vessel through the agency of the mortgagor promote the interest of the mortgagee as well as the mortgagor, either by enabling the latter to navigate her, and thus earn money to pay the indebtedness due the former, or to preserve her value as a security therefor."

¹ *Reeder v. The George Creek*, 3 Hughes C. C. 584; *The Emily Souder*, 17 Wall. (U. S.) 666; *The Granite State*, 1 Sprague C. C. 277; *Scott's Case*, 1 Abb. C. C. 336; *Baldwin v. The Bradish Johnson*, 3 Woods C. C. 582; *Hatton v. The Melita*, 3 Hughes C. C. 494; *The Josephine Spangler*, 9 Fed. Rep. 773; *The Favorite*, 3 Saw. C. C. 405; *The Hendrick Hudson*, 17 Law Rep. 93; *Zollinger v. The Emma*, 3 Cent. L. J. 285.

² *The Hiawatha*, 5 Saw. C. C. 160; *The Wm. T. Graves*, 14 Blatchf. C. C. 180; 8 Ben. D. C. 568; *The Island City*, 1 Low. D. C. 375; *The Raleigh*, 2 Hughes C. C. 44; *The St. Joseph*, 1 Brown Adm. 202; *Miller v. The Alice Getty*, 9 Chi. Leg. N. 315; *Whittaker v. The J. A. Travis*, 7 Chi. Leg. N. 275; *The Canada*, 7 Fed. Rep. 730; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236. But other courts hold a contrary doctrine. See *Baldwin v. The Bradish Johnson*, 3 Woods C. C. 582; *The John T. Moore*, 3 Woods C. C. 61; *The Kate Hinchman*, 6 Biss. C. C. 367; *The Kate Hinchman*, 7 Biss. C. C. 238; *The Grace Greenwood*, 2 Biss. C. C. 131; *The Josephine Spangler*, 9 Fed. Rep. 773.

Hence, the lien of the material-man, though subsequent in point of time, must be preferred to that of the mortgagee, either upon the authority of the local statute or the general maritime law.¹

The same rule applies at common law, when the material-men are in possession, when they have a lien which can be enforced in the admiralty. At common law a lien implies a power to hold, nothing more. The sale of the property to satisfy the lien can only be accomplished through an execution following the judgment in a personal action against the owner. He who holds a lien detains the thing which it affects until he gets his judgment, and then sells under execution.²

§ 476. **Repairs by the Mortgagor in Possession.**—A mortgagor who is allowed to retain possession of the vessel, has an implied authority to make repairs, which will be a lien superior to the mortgage; he can do all that may be necessary to keep the vessel in an efficient state for its purpose.³

Under such circumstances it must be taken as true that the owner uses his vessel with the knowledge and consent of the mortgagee, and that repairs are necessary to keep the vessel in a suitable condition for use, and the lien for repairs takes priority to the mortgage. The vessel having been damaged, and rendered unfit for use, the owner must do that which is for the advantage of all parties interested by putting her into the hands of ship carpenters for repairs, who have a right of lien on the vessel superior to that of a prior mortgage.⁴

§ 477. **Shipwright's Lien.**—There is no maritime lien in favor of a shipwright, and therefore to perfect his lien he must retain possession of the vessel.⁵

¹The *John Farron*, 14 Blatchf. 24; The *William T. Graves*, 14 Blatchf. 189; The *Hiawatha*, 5 Saw. C. C. 160; The *Island City*, 1 Low. D. C. 375; The *Norfolk*, 2 Hughes C. C. 123; The *Favorite*, 3 Saw. C. C. 405.

²*Marsh v. The Minnie*, 6 Am. Law Reg. 328; *Scott v. Delahunt*, 65 N. Y. 128.

³*Williams v. Allsup*, 10 C. B. (N. S.) 417.

⁴*Scott v. Delahunt*, 65 N. Y. 128.

⁵The *Two Ellens*, 4 L. R., P. C. 161; 3 L. R., Adm. & E. 345.

A shipwright has a lien on vessels navigating the seas, or on canal boats, as security for repairs made at the request of the mortgagor,¹ and he may, at common law, detain the ship until his demand is paid. This right of detention is called a lien at common law. The lien of a shipwright, at common law, is postponed to all prior maritime liens, but is entitled to priority over all liens that accrue while the ship is in the yard, even though they are maritime.²

§ 478. **Maryland Doctrine.**—Under the Maryland law,³ a lien upon certain vessels for material furnished and work done upon said vessels, shall not entitle the claimants to preference over creditors or claims secured by mortgage, or bill of sale properly recorded and executed before the claims to be secured by such lien shall have accrued, when there is one entire contract for the repairs of the vessels. But if the repairs are done from time to time upon orders of the owner, only such repairs will have preference over a mortgage duly recorded as were done prior to the date of the record of such mortgage.⁴

§ 479. **Massachusetts Doctrine.**—The statute⁵ of Massachusetts gives a lien for labor and material used in the construction or repair of a vessel, and for supplies furnished her, in preference to all other liens except mariners' wages. This lien takes priority over an antecedent mortgage, and may be enforced after the mortgagee has taken possession.⁶

§ 480. **Recording at the Custom-House—Effect of.**—If a mortgage of a vessel of the United States is recorded at the custom-house where the vessel is registered or enrolled, then it is valid against subsequent mortgages, although the first

¹Scott v. Delahunt, 65 N. Y. 128; The Acacia, 42 L. R. (N. S.) 264; Williams v. Allsup, 10 C. B. (N. S.) 417. See Marsh v. The Minnie, 6 Am. L. Reg. 328; The Gustav, Lush. 506.

²The Gustav, Lush. 506.

³Md. Code, art. 67, §§ 44-48.

⁴Blades v. The Marcella Ann, 34 Fed. Rep. 142.

⁵Gen. Stat. ch. 151, § 12.

⁶The Granite State, 1 Sprague D. C. 277; Donnell v. The Starlight, 103 Mass. 227.

mortgagee does not comply with the State statute relating to the registration of chattel mortgages, for the act of congress is paramount to and exclusive of State laws upon the same subject.¹ The mortgagee is also entitled to priority over an antecedent mortgage which was not recorded in the custom-house where the vessel was registered or enrolled, although it was recorded at some other custom-house,² or pursuant to State laws, unless he had actual notice thereof.³ If he had actual notice, then his mortgage is postponed to the prior mortgage.⁴ But if a vessel on which a mortgage is given while it is in process of construction is subsequently registered or enrolled, and another mortgage given to a person who has no notice of the first, and who has his mortgage duly recorded at the custom-house, then the last mortgage is entitled to priority over the first.⁵ A different doctrine is held in Indiana.⁶

§ 481. **The State Courts Have Jurisdiction to Classify Liens Upon Domestic Vessels.**—The State courts can determine the rank of liens upon domestic vessels.⁷ Thus, liens given by the laws of a State for supplies furnished domestic vessels, take precedence of a mortgage subsequently recorded.⁸ The States are competent to create liens which will take preference to the lien of a mortgage recorded pursuant to the act of congress; they can determine the conditions of priority, so long as they do not infringe upon the legislation of con-

¹ *White's Bank v. Smith*, 7 Wall. (U. S.) 646; *Aldrich v. Ætna Co.*, 8 Wall. (U. S.) 491; *Blanchard v. The Martha Washington*, 1 Cliff. C. C. 463; *Mitchell v. Steelman*, 8 Cal. 363; *Fontaine v. Beers*, 19 Ala. 722; *Robinson v. Rice*, 3 Mich. 235.

² *The John T. Moore*, 3 Woods C. C. 61.

³ *Foster v. Chamberlain*, 41 Ala. 158; *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38.

⁴ *Moore v. Simonds*, 100 U. S. 145.

⁵ *Perkins v. Emerson*, 59 Me. 319.

⁶ *Stinson v. Minor*, 34 Ind. 89.

⁷ *The William T. Graves*, 14 Blatchf. C. C. 189; *The Granite State*, 1 Sprague C. C. 277; *Thorsen v. The J. B. Martin*, 26 Wis. 488; *The Harrison*, 2 Abb. (U. S.) 74; *The City of Tawas*, 3 Fed. Rep. 170.

⁸ *The Harrison*, 2 Abb. (U. S.) 74.

gress, by imposing additional requisites in the recording of mortgages.¹

§ 482. **When the United States Statute Does Not Apply to Domestic Vessels.**—This statute does not apply to liens created by State laws for supplies or repairs to domestic vessels, but it relates only to the registration of written instruments.² So, a mortgage of a vessel of the United States is, therefore, inferior to a prior lien under State laws of the State in which the custom-house is located at which the mortgage is recorded.³ However, if the vessel be removed into another State, after the attaching of the lien of the State law, and there registered or enrolled, a mortgage duly recorded at the custom-house, in the other State, is entitled to priority over the antecedent lien under the State law.⁴

§ 483. **A Domestic Vessel—Definition.**—A domestic vessel is one whose home port is within the State. A vessel owned in another State is a foreign vessel.⁵ As between the parties, and those who deal with the vessel, and when the national character is not in dispute, the person in rightful possession, navigating the vessel for his own use and profit, by officers and mariners appointed and employed by himself, will be considered the special owner, whether he be lessee, mortgagee or parol vendee, notwithstanding some other party may have the legal ownership.⁶

§ 484. **State Courts Can Enforce the Liens Created By State Laws for Supplies and Repairs.**—The State courts can enforce the liens created for materials and supplies and work done to vessels. It is a general rule that a State court has jurisdiction to enforce liens created by its laws, for labor and material furnished in constructing or repairing domestic

¹ The William T. Graves, 14 Blatchf. C. C. 189.

² Thorsen v. The J. B. Martin, 26 Wis. 488.

³ The Harrison, 2 Abb. C. C. 74; The Theodore Perry, 8 Cent. L. J. 191; The Favorite, 3 Saw. C. C. 405.

⁴ The Underwriters Wrecking Co. v. The Katie, 3 Woods C. C. 182.

⁵ Weaver v. The S. G. Owens, 1 Wall. Jr. C. C. 359; Ex parte Easton, 95 U. S. 68; The Albany, 4 Dill. C. C. 439.

⁶ Weaver v. The S. G. Owens, 1 Wall. Jr. C. C. 359.

vessels.¹ So, also, if the general owner, who has the exclusive possession and control of the vessel, resides in such port, although she has been registered in the port of another State in the name, as owner, of a person there residing, to whom the builder's certificate has been made, but whose real interest in her is that of mortgagee.²

The State courts have the right of proceeding *in rem* against domestic vessels for supplies and repairs, which have been assumed upon the authority of a lien given by State laws.³

§ 485. **Valid Laws of Congress Must Prevail.**—When there is a conflict between the United States and the State statute, the former must prevail. Thus, a lien created by a State statute for supplies or material furnished, is subordinate to that of a mortgage given and recorded under the act of congress. A mortgage properly recorded under an act of congress takes precedence of a lien under a State law for supplies and material furnished subsequently to the mortgage. The legislation of congress, within its legitimate authority, must override all State legislation upon the subject, even if in force.⁴

ARTICLE III.—RELATIVE RIGHTS OF PARTIES.

486. The Mortgagee in Possession.

487. The Mortgagee Out of Possession.

488. When the Mortgagee is Entitled to the Earnings.

489. Liability for Master's Wages.

§ 486. **The Mortgagee in Possession.**—A mortgagee in possession of the vessel is liable for supplies furnished, and for

¹ The *Belfast*, 7 Wall. (U. S.) 624; The *Fanny*, 2 Low. D. C. 508; *Foster v. The Richard Busteed*, 100 Mass. 409; *McMonagle v. Nolan*, 98 Mass. 320.

² *Donnell v. The Starlight*, 108 Mass. 227.

³ *McGuire v. Card*, 21 How. (U. S.) 248.

⁴ The *Sky Lark*, 2 Biss. C. C. 251; The *Lady Franklin*, 2 Biss. C. C. 121; The *Barque Great West v. Obendorf*, 57 Ill. 168; The *Propeller Hilton*, 62 Ill. 230; *Merrick v. Avery*, 14 Ark. 370; *Baldwin v. The Bradish Johnson*, 3 Woods C. C. 582; The *John T. Moore*, 3 Woods C. C. 61; The *Grace Greenwood*, 2 Biss. C. C. 131.

those furnished by the master or by his authority.¹ On the other hand, a mortgagee's possession, to entitle him to a lien on the freight, must be such as to terminate that of the owner.²

If the mortgagee allows the mortgagor to retain possession, he subjects the vessel to such liens as may accrue under the mortgagor's management.³ But the mere legal ownership conferred by a mortgage, when accompanied by possession, does not make the mortgagee liable for the ship's debts unless they were contracted on his credit.⁴

§ 487. **The Mortgagee Out of Possession.**—A mortgagee out of possession is never considered as owner, and consequently cannot be held liable for repairs done or supplies furnished the vessel, unless by his authority.⁵

The right to recover payment for repairs and supplies does not depend on the registry or enrollment, but on the right and authority of the person with whom the parties deal. The mortgagee out of possession may, by his acts, hold himself out as the real owner of the vessel in such a way as to lead persons to believe that the master or mortgagor is his agent, authorized to make contracts concerning the vessel, in which case he would be bound. He is not liable when out of possession, though he holds a bill of sale absolute, but intended only as collateral security for a debt, and the vessel is registered in his name.⁶

§ 488. **When the Mortgagee is Entitled to the Earnings.**—In an action under the Code of Louisiana to enforce a mort-

¹ *Luce v. Hadley*, 119 Mass. 229.

² *The Wexford*, 7 Fed. Rep. 674.

³ *The Live Oak*, 30 Fed. Rep. 78.

⁴ *The Troubadour*, L. R., 1 Adm. & Ecc. 302.

⁵ *Fox v. Holt*, 4 Ben. D. C. 278.

⁶ *Morgan v. Shinn*, 15 Wall. (U. S.) 105; *Myers v. Willis*, 17 C. B. 77; *Duff v. Bayard*, 4 W. & S. (Pa.) 240; *Howard v. Odell*, 1 Allen (Mass.) 85; *Rice v. Cobb*, 9 Cush. (Mass.) 302; *Wood v. Stockwell*, 55 Me. 76; *Macy v. Wheeler*, 30 N. Y. 231; *Dugan v. Pentz*, 2 Hughes C. C. 66; *Philips v. Ledley*, 1 Wash. C. C. 226; *Jones v. Blum*, 2 Rich. (S. Car.) 475; *Lord v. Ferguson*, 9 N. H. 380; *Weber v. Sampson*, 6 Duer (N. Y.) 358; *Hesketh v. Stevens*, 7 Barb. (N. Y.) 488; *Champlin v. Butler*, 18 Johns. (N. Y.) 169; *Bryan v. Bowles*, 1 Daly (N. Y.) 171; *Miln v. Spinola*, 4 Hill (N. Y.) 177; *Brooks v. Bondsey*, 17 Pick. (Mass.) 441.

gage on a tug, the tug was sequestered, and the mortgagees, on giving a bond with securities therefor, took the vessel into their possession and put her into the hands of their agent. He used her for hire. The vessel was subsequently sold to satisfy their debt, and they took her as purchasers. On a libel filed against the tug by the original owner to recover the earnings of the tug while in the agent's possession, it was held that the possession was lawful, and that neither the agent nor his principals were liable, either in contract or in tort, for such earnings.¹

Where the owner of a ship assigned the freight not yet earned, with the knowledge of the assignee, mortgaged the ship, the mortgage being duly registered, but the assignee neglected to give notice of his claim to the mortgagee, the mortgagee's claim took priority.²

§ 489. **Liability for Master's Wages.**—A mortgagee of a ship at sea does not merely, by delivery of the documents, acquire such a possession as to be made liable to the master for wages accruing after date of the mortgage. Chief Justice Tilghman says that if the ship comes into the actual possession of the mortgagee and he retains the master in the same service without any particular contract, the law will raise the assumption of payment for his services by the mortgagee. But when the mortgagee has not such possession, but only that vested in him by the mortgage and delivery of the ship's documents, he is not responsible to the master.³

So, the mortgagee of a ship, who is the registered owner, is not liable to a claim for wages by a sailor, though they accrued upon a voyage which was prosecuted for the benefit of the mortgagee, and the ship's freight and earnings during the voyage were made over to the mortgagee, by the same deed which conveyed the ship, as a security for advances, because the sailor had made the contract on which he sued,

¹ *Baldwin v. Beak*, 119 U. S. 643.

² *Wilson v. Wilson*, L. R., 14 Eq. 32; *Lindsay v. Gibbs*, 22 Beav. 522.

³ *Fisher v. Willing*, 8 S. & R. (Pa.) 119.

with the mortgagor, the master of the ship, and had given credit to him, and therefore the mortgagee was not liable.¹ But a mortgagee of a ship, in possession, is liable to the master for his wages, if the voyage be performed for the benefit of the mortgagee.

Whenever the master makes a special agreement as to his wages with the mortgagor, he is held to such agreement, and cannot waive it and sue the mortgagee as owner of the ship.²

ARTICLE IV.—ENFORCEMENT—FORECLOSURE.

- 490. Jurisdiction of Admiralty Courts.
- 491. A Libel Upon a Mortgage Cannot be Sustained.
- 492. A Mortgagee May Petition as a Co-Libelant.
- 493. Priority of the Taxed Costs of the Mortgagee Over Lien of Material-Men.
- 494. Rights of the Holder of a Bill of Sale in the Nature of a Mortgage.
- 495. Mortgage Upon a Moiety.
- 496. Mortgagee's Rights When There are Several Owners.
- 497. In Case of Unauthorized Sale by Mortgagor.
- 498. Default—Effects of.
- 499. Application of the Statute of Frauds.
- 500. Actions to Realize Priority.
- 501. The *Lex Fori* Governs.

§ 490. **Jurisdiction of Admiralty Courts.**—There is no jurisdiction in admiralty to foreclose a mortgage of a vessel by a sale or by a transfer of the possession to the mortgagee.³ A court of admiralty has no jurisdiction to foreclose a mortgage. Whether the mortgage is foreclosed, whether the mortgagee has a right to take possession of chattels-personal, whether he is the legal or only an equitable owner, whether a right of redemption means that a mortgagee is restrained from selling in payment of his debt after the time specified

¹ *Martin v. Paxton*, 1 *Holt on Shipping* 353.

² *Champlin v. Butler*, 18 *Johns. (N. Y.)* 169.

Under the act of 17 and 18 *Vict. ch. 104*, § 191, the master of a British ship has the same lien for his wages as a seaman. He is, by virtue of this statute, entitled to priority over an antecedent mortgagee. *The Chieftain*, *Brow. & L.* 212; *The Feronia*, *L. R.*, 2 *A. & E.* 65; *The Mary Ann*, *L. R.*, 1 *A. & E.* 8; *The Hope*, 1 *Asp. M. L. Cas.* 563; 28 *L. T. (N. S.)* 487; *The Wexford*, 7 *Fed. Rep.* 674.

³ *Bogart v. The Steamboat John Jay*, 17 *How. (U. S.)* 399.

for redemption is passed, are questions which belong to other courts for decision; they are not within the jurisdiction or provisions of the courts of admiralty, which never decide on questions of property between the mortgagee and owner.¹

§ 491. **Libel Upon a Mortgage Cannot be Sustained.**—A libel upon a mortgage cannot be sustained as an original proceeding in a court of admiralty. But the mortgagee can petition for the surplus of a vessel libeled and sold, and is entitled to have the same applied to his mortgage. A mortgage cannot be a maritime lien, not founded upon a maritime debt.

Bradley, J., in closing the decision, says: "In this case the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court. * * * But before a final decree they filed a petition for the surplus proceeds, and, as there is no question in the case about fraudulent preference under the Bankrupt law, they are entitled to those proceeds towards satisfaction of their mortgage."²

Those having a valid lien can go into court and petition for the application of the surplus proceeds of the vessel sold to the payment of their debt.

The court has power to distribute surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated.³ But the propriety of such a distribution in the admiralty court has been questioned, on the ground that the court would thereby draw to itself equity jurisdiction.⁴ But it is a wholesome jurisdiction, very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is

¹The *Neptune*, 3 Hagg. Adm. 132; *Schuchardt v. The Angelique*, 19 How. (U. S.) 239; *The Sailor Prince*, 1 Ben. D. C. 461; *Morgan v. Tapscott*, 5 Ben. D. C. 252.

²The *Lottawanna*, 21 Wall. (U. S.) 558.

³*Schuchardt v. Babbidge*, 19 How. (U. S.) 239.

⁴The *Neptune*, 3 Knapp's Privy Council 111.

no sound reason why admiralty courts should not do the same. If it should be so complicated as to require the interposition of a court of equity, the District Court of the United States can refuse to act, and refer the parties to a more competent tribunal.¹

§ 492. **A Mortgagee May Petition as a Co-Libelant.**—A mortgagee of a vessel sunk by a collision is entitled, for the protection of his mortgaged interest, to come in on petition as a co-libelant in a libel filed by the owners against the offending vessel.² He may also represent in such petition the interest of insurers, by their consent, who have paid a part of the loss.³

Where jurisdiction of the *res* in admiralty has already been otherwise acquired in direct proceedings against the mortgaged vessel itself, the mortgagee's interest in the *res* is recognizable, and he may intervene for the protection of his interest either before or after the sale.⁴

§ 493. **Priority of the Taxed Costs of the Mortgagee Over Liens of Material-Men.**—Where a mortgagee brings an action to realize his security, and a material-man, with a common-law lien on the ship, intervenes, and the ship, by order of court, is sold, the proceeds being only sufficient to satisfy the claim of the material-man, the mortgagee is entitled to be paid his taxed costs up to the date of the sale, out of the proceeds of the sale of the ship, in priority of the material-man.⁵

§ 494. **Rights of the Holder of a Bill of Sale in the Nature of a Mortgage.**—A holder of a bill of sale of a vessel, absolute on its face, though intended as a mortgage, may main-

¹ 1 Conkl. Adm. pp. 48-66 (2d ed.)

² The Grand Republic, 10 Fed. Rep. 398.

³ Fretz v. Bull, 12 How. (U. S.) 466; Monticello v. Mollison, 17 How. (U. S.) 152; Hall v. Railroad Co., 13 Wall. (U. S.) 367; Campbell v. Anchoria, 9 Fed. Rep. 840.

⁴ The Old Concord, 1 Brown Adm. 270; Schuchardt v. The Angelique, 19 How. (U. S.) 239.

⁵ The Sherbro, 52 L. J., P. Div. & Adm. 28.

tain an action for the conversion of the vessel, against a wrong-doer.¹

One who has taken and caused to be recorded a bill of sale of a vessel absolute in form, but intended only as collateral security, but who has never taken control of the management, can recover on a policy of insurance against "barratry of the master, unless the insured be owner of the vessel," although he has charged the premium to the real owner, if the owner has not notice of such charge.²

§ 495. **Mortgage Upon a Moiety.**—Where a mortgage exists upon a moiety of a vessel which was afterwards libeled, condemned and sold by process in admiralty, and the proceeds brought into the registry of the court, a mortgagee was not allowed to file a libel against the moiety of these proceeds. The proper course would have been either to have appeared as a claimant when the first libel was filed, or to have applied to the court by petition for a distributive share of the proceeds.³

Where a part owner of a vessel and cargo mortgages his share thereto, and afterwards the other owners appoint an agent to sell the whole cargo, such agent, after selling the cargo and receiving the proceeds, is liable to the mortgagee, in an action for money had and received, for the mortgagor's share of the proceeds.⁴

§ 496. **Mortgagee's Rights Where There are Several Owners.**—A mortgagee of a vessel takes it with all the rights and powers which were passed by the mortgage, and no equities existing among several creditors will deprive the assignee of any of the usual remedies for the enforcement of the security.

The court says as the mortgage was on the entire vessel, it should so be treated on foreclosure; that there would be no propriety in selling a half interest separately. In marshaling securities covering several parcels, the land may

¹ Clark v. Wilson, 103 Mass. 219.

² Clark v. Washington Ins. Co., 100 Mass. 509.

³ Schuchardt v. Babbidge, 19 How. (U. S.) 239.

⁴ Milton v. Mosher, 7 Met. (Mass.) 244.

be sold in such order as will best carry out the principle of equity, but there is no instance where an entire parcel, mortgaged as such, has been sold in separate undivided interests; nor would such sale of a vessel tend to raise more money than a sale of the entirety. It would rather lead to mischief, as it might be a decided objection to purchasing one-half, that the other was in bad hands.¹

§ 497. **In Case of Unauthorized Sale by Mortgagor.**—If a mortgagor of a vessel, without the authority of the mortgagee, sells it with warranty as to title, and receives as consideration for the sale promissory notes, the mortgagee may elect to enforce his right to the vessel, or he may follow, in equity, the proceeds in the form of the promissory notes in the hands of the mortgagor or his representative, but he cannot do both. Kent, J., speaking for the court, said: "It may be admitted that the relation of mortgagor and mortgagee does not of itself, and unconnected with other facts, create the relation of principal and agent, or give any right to the mortgagor to sell the whole property, by an absolute bill of sale, with warranty of a perfect title. The mortgagor in possession may sell his interest, that is, his right to redeem, but he is a wrong-doer if he sells and delivers the entire property to a purchaser, without the knowledge or assent of the mortgagee. * * * It may also be granted that, as to the mortgagee and his title and interest, such sale does not convey nor impair his title, and that he may pursue and enforce his right to the thing, wherever he may find it," the mortgagee to follow the proceeds existing in the new form of negotiable notes in the hands of the mortgagor or the representative of his estate.²

§ 498. **Default—Effects of.**—Upon default in a mortgage of a ship, the legal title of the mortgagee becomes absolute. The mortgagee must then take possession of the vessel and apply it to the mortgage debt, either by proceedings in

¹ *Dalrymple v. Sheehan*, 20 Mich. 224.

² *McLarren v. Brewer*, 51 Me. 402.

equity or by statutory remedies, so as to bar the mortgagor's right of redemption. There is no jurisdiction in admiralty to foreclose a mortgage of a vessel by a sale, or by transfer of possession to the mortgagee. A debt secured by the mortgage of a ship does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to the mortgagee. Where there has been a default he cannot take the ship *manu forti*, but he must resort either to a court of equity or to statutory remedies for the same purpose, when they exist, to bar the mortgagor's right of redemption by a foreclosure, which is to operate at such time afterwards when there shall be a foreclosure without a sale, as the circumstances of the case make it equitable to allow.¹

After a final order of foreclosure has been signed and enrolled, and the time set by it for the payment of the money has passed, the decree may be opened to give further time, if there are circumstances to make it equitable to do so, with an ability in the mortgagor to make prompt payment.²

The court of admiralty has no jurisdiction over the question of mortgages on ships. Whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel-personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that the mortgagee is restrained from selling in payment of his debt till after the time specified for the redemption is passed, do not come under the jurisdiction of the admiralty court, which never decides on questions of property between the mortgagee and owner.³

§ 499. **Application of the Statute of Frauds.**—A mortgagee not in possession and not originally liable for supplies fur-

¹ *Bogart v. The Steamboat John Jay*, 17 How. (U. S.) 399.

² *Thornhill v. Manning*, 7 Eng. Rep. 97.

³ *The Neptune*, 3 Hagg. Adm. 132. There has been an enlarged cognizance of mortgages of ships by statute 3 and 4 Vict. ch. 65, in England, so now the policy of commerce and its exigencies in England have given to the admiralty courts a more ample jurisdiction in respect to mortgages of ships than they had under the former rule, before the adoption of statutes.

nished her, orally promised to pay for them, provided the creditor would not attach the interest of the other part owners. It was decided that such promise was within the statute of frauds and hence the vessel was not liable.¹

§ 500. **Actions to Realize—Priority.**—It is generally held that the proceeds arising from the sale of a ship may be distributed among those who have pending libels, or who file intervening petitions, according to their respective rights. A holder of a lien cannot obtain any right to priority over other liens of an equal rank or a higher rank, by being the first to begin suit and to be the first to obtain a decree.² But this rule is not without exceptions of high authority.³ It has been held by Judge Brown that no creditor can intervene after the filing of a report classifying the claims.⁴

§ 501. **Lex Fori Governs.**—When a conflict of the rights of the respective lien-holders exists, the general rule is that whether one lien is entitled to priority over another depends upon the *lex fori* and not upon the *lex loci contractus*.⁵

¹Ames v. Foster, 106 Mass. 400.

²The America, 16 Law Rep. 264; The Fanny, 2 Low. D. C. 508; The E. A. Barnard, 2 Fed. Rep. 712; The Superior, Newb. 176; The City of Tawas, 3 Fed. Rep. 170; The Desdemona, Swab. 158.

³The Saracen, 4 Notes of Cases 498; 2 Wm. Rob. 451; 6 Moore P. C. 456; The Clara, Swab. 1; The William F. Safford, Lush. 69; The Globe, 2 Blatchf. C. C. 427; The Triumph, 2 Blatchf. C. C. 433; Goble v. The Delos De Wolf, 3 Fed. Rep. 236; The Pathfinder, 4 Week. Notes 528.

⁴The City of Tawas, 3 Fed. Rep. 170.

⁵The Union, Lush. 128; The Selah, 4 Saw. C. C. 40.

PART IV.—CONTRACTS IN FRAUD OF THIRD PERSONS.

CHAPTER XII.

FRAUDULENT CONVEYANCES.

ARTICLE I.—RETAINING POSSESSION WITHOUT RECORDING
THE INSTRUMENT.

502. Possession.

503. Change of Possession.

§ 502. Possession.—The common-law rule is, that possession of personal property is *prima facie* evidence of ownership. Possession of personal property with the right to deal with it at pleasure, to the exclusion of others, is a degree of title, although the lowest.¹

By the common law, delivery was not considered necessary to vest the title in the vendee.²

So, also, in bailments, the possession is held by parties who are not the owners, but fraud is not, therefore, implied, and the real owner's title is not imperiled.³

The rule deducing fraud as a conclusion of law from the simple retention of possession by the vendor or mortgagor originated in England in a very early day, when there were no registry laws, or none requiring such instruments as chattel mortgages to be registered. This policy was adopted to prevent a party from acquiring a false and deceptive credit on the strength of the possession of property which he had

¹ Brown v. Volkening, 64 N. Y. 76; Sullivan v. Sullivan, 66 N. Y. 37; Swift v. Agnes, 33 Wis. 228; Rawley v. Brown, 71 N. Y. 85; Mooney v. Olsen, 21 Kans. 691.

² Miller v. Pancoast, 29 N. J. L. 250; Frazier v. Fredericks, 24 N. J. L. 162; Monroe v. Hussey, 1 Oreg. 190; Davis v. Turner, 4 Gratt. (Va.) 422.

³ Capron v. Porter, 43 Conn. 389.

sold or mortgaged, and yet of which he retained possession, enjoyment and apparent ownership.¹

§ 503. **Change of Possession.**—An agreement to let the vendor retain possession of the property and use it is not considered to be a common and ordinary transaction in the usual course of business. Such an arrangement excites suspicion, and it is regarded in many of the cases as the bounden duty of the courts, for the safety and protection of creditors, to call upon and hold the vendee in all such cases to explain clearly and satisfactorily how an absolute sale could have been *bona fide* and yet the vendor retain the use and possession of the chattels.²

In many of the States a failure to effect a change of possession is made either presumptively or conclusively fraudulent; but the statutes of those States, on this subject, are differently interpreted. The prevalent policy of both English³ and American courts is to consider the absence of a change of possession as *prima facie* or presumptive evidence of fraud.

Lord Eldon says, the circumstances of possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of fraud, which may be overcome by proof of the honesty of the transaction. Accordingly, after the conveyance of goods and chattels, want of possession does not constitute fraud, as against creditors, but is only evidence of it.⁴

¹ Hughes v. Cory, 20 Iowa 399; Bullock v. Williams, 16 Pick. (Mass.) 33; Tootle v. Coldwell, 30 Kans. 125; Hosea v. McClure, 42 Kans. 403.

² Wait on Fraud. Conv. § 246.

³ Kidd v. Rawlinson, 2 Bos. & Pull. 59; Leonard v. Baker, 1 Maule & Sel. 251; Latimer v. Batson, 4 Barn. & Cres. 652; Arundell v. Phipps, 10 Ves. 139; Paget v. Perchard, 1 Esp. 205; Reed v. Blades, 5 Taunt. 212; Martindale v. Booth, 3 B. & Ad. 498; Steward v. Lombe, 1 Brod. & B. 506.

⁴ Kidd v. Rawlinson, 2 Bos. & Pull. 59.

ARTICLE II.—STATE DECISIONS—FRAUDULENT PRIMA FACIE
—FRAUDULENT PER SE.

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| 504. When <i>Prima Facie</i> Fraud. | 523. Oregon. |
| 504a. Alabama. | 524. Rhode Island. |
| 505. Arkansas. | 525. Tennessee. |
| 506. Dakota. | 526. Texas. |
| 507. Georgia. | 527. Virginia. |
| 508. Indiana. | 528. Wisconsin. |
| 509. Kansas. | 529. Fraudulent <i>per se</i> or Conclu- |
| 510. Louisiana. | sive—California. |
| 511. Maine. | 529a. Colorado. |
| 512. Maryland. | 530. Connecticut. |
| 513. Massachusetts. | 531. Delaware. |
| 514. Michigan. | 532. Florida. |
| 515. Minnesota. | 533. Illinois—Warehouse Receipts. |
| 516. Mississippi. | 534. Iowa. |
| 517. Nebraska. | 535. Kentucky. |
| 518. New Hampshire. | 536. Missouri. |
| 519. New Jersey. | 537. Nevada. |
| 520. New York. | 538. Pennsylvania. |
| 521. North Carolina. | 539. Vermont. |
| 522. Ohio. | |

§ 504. **When Prima Facie Fraud.**—To enter upon a labored discussion of the principles underlying fraudulent sales would be a supererogatory work, as the law has been settled in the States.

The rules of the different States as to sales will be given, and their applicability to chattel mortgages.

§ 504a. **Alabama.**—The retention of possession by the vendor after an absolute sale is, at most, only *prima facie* evidence of fraud, and may be rebutted or explained.¹ Thus, if the vendor retains possession of the goods after a sale, and continues to sell them as before, this is merely a badge of fraud which is susceptible of explanation.²

§ 505. **Arkansas.**—The rule is adopted in this State that

¹ Crawford v. Kirksey, 55 Ala. 282.

² Moog v. Benedicks, 49 Ala. 512; and see Upson v. Raiford, 29 Ala. 188; Millard v. Hall, 24 Ala. 209; Mayer v. Clark, 40 Ala. 259; Hobbs v. Bibb, 2 Stew. 54. Noble v. Gunter, 16 Ala. 77; Andrews v. Jones, 10 Ala. 460; Wyatt v. Stewart, 34 Ala. 716. Same rule applies to chattel mortgages. Murray v. McNealy, 86 Ala. 234; Constantine v. Twelves, 29 Ala. 607; Price v. Mazange, 31 Ala. 761; Wiley v. Knight, 27 Ala. 336; Tickner v. Wiswall, 9 Ala. 305.

possession by the vendor, after an absolute sale, does not amount to fraud *per se*, but merely *prima facie* evidence of fraud, subject to be explained. When a deed postponed the date of payment for an unreasonable length of time after the maturity of the debts by it, a provision that the grantor shall retain possession and use of the property until default of payment, a fraudulent intent to cover up the property in the use of the grantor, a hindering and delaying of creditors, may be inferred.¹

Retention of possession of personal property after an absolute sale is not sufficient to sustain fraud. Evidence cannot be introduced to show that the transaction witnessed by a bill of sale was other than it recited, whether intended to be an absolute or conditional sale or mortgage or pledge; it must be determined by the written contract.²

§ 506. **Dakota.**—Under the law³ respecting fraudulent conveyances, which excepts from its operation chattel mortgages, when allowed by law, a chattel mortgage duly executed and filed is not even *prima facie* fraudulent as against the mortgagor's creditors, though it provides that the mortgagor may retain possession of the goods.⁴

§ 507. **Georgia.**—It is the settled rule in this State that possession of personal property by the vendor after an absolute sale or conveyance is a badge of fraud, which is susceptible of explanation. Thus, when a party holds possession of the chattel sold, he may explain the reason of his possession, and thus show the transaction to be *bona fide*.⁵ But it is held by statute that conditional sales are invalid as to third parties, unless such sales are executed like chattel mortgages.⁶

§ 508. **Indiana.**—The retention by the vendor of the pos-

¹ *Hempstead v. Johnston*, 18 Ark. 134.

² *George v. Norris*, 23 Ark. 121. See, also, *Cocke v. Chapman*, 2 Eng. 197; *Danly v. Rector*, 5 Eng. 224. Same as to chattel mortgages. *Sparks v. Mack*, 31 Ark. 666.

³ Civil Code, § 2024.

⁴ *Reichert v. Simons*, 42 N. W. Rep. 657.

⁵ *Goodwyn v. Goodwyn*, 20 Ga. 600.

⁶ Code, § 1955a.

session of goods sold is *prima facie* evidence of fraud. The purpose or intent of the parties to the sale of goods must be judged of by all the circumstances connected with the transaction.¹ Statutory provisions control in this State.²

§ 509. **Kansas.**—The law is that the retention of personal property after absolute sale, by the vendor, is only *prima facie* fraudulent, and may be explained by evidence. So if the possession is retained by the mortgagor.³ But a statute provides that conditional sales shall be void as to creditors and innocent purchasers for value, unless such sales are made to conform with the laws applicable to chattel mortgages.⁴

§ 510. **Louisiana.**—The precarious possession of personal property carries with it the presumption of simulation, but this presumption may be disputed by the vendee showing the reality of the sale. Judge Howe says that if the vendor is in possession after the sale, by the consent of the vendee, the possession is precarious,⁵ and the sale would, therefore, be presumed to have been simulated, but that this presumption is not conclusive, but may be disputed by the vendee showing the reality of the sale.⁶

§ 511. **Maine.**—If the vendor retains possession of personal property after absolute sale, this is only *prima facie* fraudulent. Thus, the failure of the vendee to take possession of the property after sale is presumptive evidence of fraud, and the jury may determine the good faith of the transaction.⁷

¹ *Kane v. Drake*, 27 Ind. 29; *Nutter v. Harris*, 9 Ind. 88; *Case v. Winship*, 4 Blackf. 425; *Rose v. Colter*, 76 Ind. 590; *New Albany Ins. Co. v. Wilcoxson*, 21 Ind. 355.

² Rev. Stat. 1881, § 4924. Same rule as to chattel mortgages. *McFadden v. Fritz*, 90 Ind. 590; *Dessar v. Field*, 99 Ind. 548; *Fisher v. Syfers*, 109 Ind. 514.

³ *Phillips v. Reitz*, 16 Kans. 396; *Wolfley v. Rising*, 8 Kans. 297; *Frankhouser v. Ellett*, 22 Kans. 127; *Howard v. Rohlfing*, 36 Kans. 357.

⁴ Laws of 1889, ch. 255.

⁵ Civil Code, § 3522.

⁶ *Guice v. Sanders*, 21 La. Ann. 463; *Keller v. Blanchard*, 19 La. Ann. 53; Civil Code, § 2456; *Miltenberger v. Parker*, 17 La. Ann. 254.

⁷ *Shaw v. Wilshire*, 65 Me. 485; *Bartlett v. Blake*, 37 Me. 124; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Googins v. Gilmore*, 47 Me. 9; *Cutter v.*

§ 512. **Maryland.**—The failure of the vendee of personal property to take possession where the deed shows that the sale was not to have its completion immediately, but was prospective to a future event, the possession retained by the vendor is not a fraud.¹ A bill of sale may be recorded, and the title of the grantee is then as effectually protected as if the sale had been accompanied by delivery.²

§ 513. **Massachusetts.**—The possession of personal chattels by the vendor after an alleged sale, is not conclusive evidence of fraud, upon proof that the sale was made in good faith, and for a valuable consideration, and that the possession after the sale was in pursuance of some agreement not inconsistent with honesty in the transaction, and the vendee may hold the property against creditors.³ In settling the question of fraud, there must be considered the manner of occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, which will be passed on by the jury.⁴

It is necessary as against subsequent purchasers or attaching creditors, that there shall be a delivery of the property. When no such delivery, actual or symbolical, is proved, and the buyer does no act by way of taking possession or exercising ownership, and the seller does not agree to hold or keep the property for the vendee, and when there is no evidence of delivery for the consideration of the jury, except such as may be implied from the execution and delivery of the bill of sale, such circumstances are not sufficient.⁵

Copeland, 18 Me. 127; McKee v. Garcelon, 60 Me. 165. As to chattel mortgages, see Deering v. Cobb, 74 Me. 332; Allen v. Goodnow, 71 Me. 420.

¹ Hudson v. Warner, 2 H. & G. (Md.) 415.

² Kreuzer v. Cooney, 45 Md. 582; Clary v. Frayer, 8 G. & J. (Md.) 416; and see Price v. Pitzer, 44 Md. 527. As to chattel mortgages, see Hamilton v. Rogers, 8 Md. 301.

³ Brooks v. Powers, 15 Mass. 244; Shurtleff v. Willard, 19 Pick. (Mass.) 202; Legg v. Willard, 17 Pick. (Mass.) 140; Hardy v. Potter, 10 Gray (Mass.) 89; Ingalls v. Herrick, 108 Mass. 354; Bartlett v. Williams, 1 Pick. (Mass.) 288.

⁴ Ingalls v. Herrick, 108 Mass. 354.

⁵ Dempsey v. Gardner, 127 Mass. 381; Carter v. Willard, 19 Pick. (Mass.) 1; Shumway v. Rutter, 7 Pick. (Mass.) 56; Packard v. Wood, 4 Gray

§ 514. **Michigan.**—By Comp. Laws, § 4703, every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by an immediate delivery, and be followed by actual and continued change of possession, shall be presumed to be fraudulent and void against creditors of the vendor and subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the person claiming under the sale that it was made in good faith and without any intent to defraud such creditor or purchaser.¹

§ 515. **Minnesota.**—Statutory provisions make a sale with possession in the vendor only a *prima facie* fraud. Thus, when an assignment is assailed on the ground of actual fraud in its execution, the question of fraud is properly submitted to the jury.²

§ 516. **Mississippi.**—Possession of personal property is not title. It is *prima facie* evidence of title but nothing more, and will not protect one who buys on the faith of it against the holder of the title. Possession of personal property by the vendor after an absolute sale is only *prima facie* fraudulent, and is explainable, and the title of the vendee is upheld when the continued possession of the vendor is explained so as to repel the presumption of fraud.³

§ 517. **Nebraska.**—By the eleventh clause of the statute of frauds, where, in the absolute sale of goods, they are left

(Mass.) 307; Rourke v. Bullens, 8 Gray (Mass.) 547; Veazie v. Somerby, 5 Allen (Mass.) 280. Same rule as to chattel mortgages. Fletcher v. Powers, 131 Mass. 333; Jones v. Huggefords, 3 Met. (Mass.) 515; Briggs v. Parkman, 2 Met. (Mass.) 258.

¹ See Hatch v. Fowler, 28 Mich. 205; Molitor v. Robinson, 40 Mich. 200; Jackson v. Dean, 1 Doug. (Mich.) 519; Bagg v. Jerome, 7 Mich. 145. Same rule as to chattel mortgages. People's Sav. Bank v. Bates, 120 U. S. 556; Gay v. Bidwell, 7 Mich. 519; People v. Williams, 35 Mich. 28; Fry v. Russell, 35 Mich. 229; Oliver v. Eaton, 7 Mich. 108.

² Blackman v. Wheaton, 13 Minn. 326; Benton v. Snyder, 22 Minn. 247; Camp v. Thompson, 25 Minn. 175. As to chattel mortgages, see Bannon v. Bowler, 34 Minn. 416; Horton v. Williams, 21 Minn. 187; Nat. Bank v. Anderson, 24 Minn. 435; Stein v. Munch, 24 Minn. 390.

³ Ketchum v. Brennan, 53 Miss. 596; Comstock v. Rayford, 20 Miss. 369; Hilliard v. Cagle, 46 Miss. 309. Same rule as to chattel mortgages. Summers v. Roos, 42 Miss. 749; Ewing v. Cargill, 13 S. & M. 79.

in possession of the vendor, in a controversy between his creditors and the purchaser, the presumption is *prima facie* that the sale was fraudulent. In such case the burden of showing the sale to have been honest is on the purchaser.¹

§ 518. **New Hampshire.**—In cases of absolute sales possession and use by the vendor, after sale, are always *prima facie* fraudulent. Thus, if the vendor retains possession after sale, the transaction is *prima facie* fraudulent, and if unexplained, conclusive evidence of a secret trust.²

§ 519. **New Jersey.**—It is the law in this State that the possession by the vendor of personal property after an absolute sale is not conclusive evidence of fraud. The vendor may hold the property by proving the sale was *bona fide*, and for a valuable consideration, and that his possession after sale was in pursuance of some agreement with honesty in the transaction.³

But by a late statute a conditional sale and possession by the vendor is absolutely void as against subsequent purchasers and mortgagees, unless the contract is recorded as in case of chattel mortgages.⁴

§ 520. **New York.**—Statutory provisions make the retention of possession, in an absolute sale, by the vendor, presumptively fraudulent. This presumption can be overcome by proof, upon which the jury may pass. The retention must be shown to have been in good faith, for an honest purpose, and with no design to defraud creditors.⁵

¹ *Densmore v. Tomer*, 14 Nebr. 392; *Uhl v. Robison*, 8 Nebr. 272. Same rule as to chattel mortgages. *Davis v. Scott*, 22 Nebr. 154; *Turner v. Killian*, 12 Nebr. 580; *Com. Stat.* p. 288, § 12.

² *Coburn v. Pickering*, 3 N. H. 415; *Lang v. Stockwell*, 55 N. H. 561; *Cutting v. Jackson*, 56 N. H. 253; *Sumner v. Dalton*, 58 N. H. 295; *Stowe v. Taft*, 58 N. H. 445; *Shaw v. Thompson*, 43 N. H. 130; *Trask v. Bowers*, 4 N. H. 309. See *Gen. Stat.* §§ 328, 329. Same rule as to chattel mortgages. *Gibbs v. Parsons*, 64 N. H. 66; *Wilson v. Sullivan*, 58 N. H. 260.

³ *Miller v. Pancoast*, 29 N. J. L. 253; *Sherron v. Humphreys*, 14 N. J. L. 220; *Parr v. Brady*, 37 N. J. L. 201; *Miller v. Shreve*, 29 N. J. L. 250; *In re Bloom*, 17 Bank. Reg. 425.

⁴ *Laws of 1889*, p. 421.

⁵ *Ball v. Loomis*, 29 N. Y. 412; *Miller v. Lockwood*, 32 N. Y. 293; *Ford v. Williams*, 24 N. Y. 359; *Hallacher v. O'Brien*, 5 Hun (N. Y.) 277; *Burnham v. Brennan*, 74 N. Y. 597; *Thompson v. Blanchard*, 4 N. Y. 303; *Hanford v. Archer*, 4 Hill (N. Y.) 271; *Tilson v. Terwilliger*, 56 N. Y. 273; *Mitchell v.*

Conditional sales are declared absolutely void against subsequent purchasers and mortgagees in good faith, and as to them such sales are deemed absolute, unless said contract is executed and filed as a chattel mortgage is.¹

§ 521. **North Carolina.**—The retention of the possession of chattels by the vendor after giving a bill of sale absolute on its face, is not, *per se*, fraudulent. Fraud is a question of law upon facts and circumstances.²

§ 522. **Ohio.**—A retention of possession on the part of the mortgagor is only a badge of fraud, which may be removed by showing the transaction was honest. The sale or mortgage of personal property and continued possession by vendor or mortgagor is only *prima facie* evidence of a fraud, which may be explained away or rebutted by showing that such possession was honest and fair.³

§ 523. **Oregon.**—The retention of personal property by the vendor after the sale thereof creates the presumption of fraud as against his creditors, but such presumption is a disputable one, and may be rebutted by testimony showing that the sale was made in good faith. This is a question for the jury.⁴

§ 524. **Rhode Island.**—An absolute transfer not followed by, or at least ostensible change of possession, at or after the time of sale, is a circumstance which, when proved, tends to show such sale merely colorable, and is a proper question for the jury to pass upon.⁵

West, 55 N. Y. 107; May v. Walter, 56 N. Y. 8. See *Mumper v. Rushmore*, 79 N. Y. 19. Same rule as to chattel mortgages. *Brackett v. Harvey*, 91 N. Y. 214; *Gardner v. McEwen*, 19 N. Y. 123; *Southard v. Pickney*, 5 Abb. N. C. 184; *Ford v. Williams*, 24 N. Y. 359; *Frost v. Warren*, 42 N. Y. 204; *Caring v. Richmond*, 22 Hun 369.

¹ Laws of 1883, ch. 383; Laws of 1884, ch. 315; Laws of 1885, ch. 488; Laws of 1888, ch. 225.

² *Rea v. Alexander*, 5 Ired. (N. Car.) L. 644. Same rule as to chattel mortgages. *Kreth v. Rogers*, 101 N. Car. 263.

³ *Collins v. Myers*, 16 Ohio 547; *Thorne v. Bank*, 37 Ohio St. 254; *Barr v. Hatch*, 3 Ohio 527; *Hombeck v. Vanmeter*, 9 Ohio 153.

Same rule as to chattel mortgages. *Kleine v. Katzenberger*, 20 Ohio St. 110; *Kilbourne v. Fay*, 29 Ohio St. 264.

⁴ *McCully v. Swackhamer*, 6 Oreg. 438.

⁵ *Sarle v. Arnold*, 7 R. I. 582; *Mead v. Gardiner*, 13 R. I. 257. See, also, *Beckwith v. Burrough*, 13 R. I. 294; *Goodell v. Fairbrother*, 12 R. I. 233.

Same rule as to chattel mortgages. *Williams v. Winsor*, 12 R. I. 9.

§ 525. **Tennessee.**—A conveyance absolute on its face, when the vendor continues to retain possession of the personal property, is *prima facie* fraudulent. But such sale may be explained and the good faith of the transaction shown, and the presumption of fraud overthrown.¹

§ 526. **Texas.**—The retention of possession, after an absolute sale, by the vendor, of personal property, is not conclusively fraudulent. Such transaction is *prima facie* fraudulent, and a badge of fraud which may be explained and the good faith of the sale shown.²

§ 527. **Virginia.**—A grantor in an absolute conveyance of personal property, continuing in possession, raises the legal presumption that the sale was fraudulent as regards creditors of the grantor, which presumption throws imperatively upon the grantor the whole burden of proof, the fairness and good faith of the transaction, and that cannot be done without sufficient evidence that the pretended sale was for a fair and valuable consideration, and, in absence of that evidence, the *prima facie* presumption becomes absolutely and irresistibly conclusive.³

§ 528. **Wisconsin.**—Retention of possession by the vendor after an absolute sale is a presumption of fraud, but the transaction can be explained and shown to be *bona fide*. But when fraud is charged in a bill of sale, possession remaining with the vendor, it must be proved.⁴

§ 529. **Fraudulent per se or Conclusive—California.**—The statute⁵ declares every transfer of personal property and every lien thereon, with few exceptions, where made by a

¹ Carney v. Carney, 7 Baxt. 284; Grubbs v. Greer, 5 Cold. 160; Maney v. Killough, 7 Yerg. 440.

² Thornton v. Smith, 39 Tex. 544.

³ Curd v. Miller, 7 Gratt. 185; Davis v. Turner, 4 Gratt. 423; Bird v. Wilkinson, 4 Leigh 266; Forkner v. Stuart, 6 Gratt. 197.

⁴ Wheeler v. Konst, 46 Wis. 398. See, also, Blakeslee v. Rossman, 43 Wis. 116; Osen v. Sherman, 27 Wis. 505; Grant v. Lewis, 14 Wis. 487. Same rule as to chattel mortgages. Cotton v. Marsh, 3 Wis. 221; Fisk v. Harshaw, 45 Wis. 665.

⁵ Civil Code, § 3440.

person in possession, and not accompanied by an immediate delivery, and followed by a continued change of possession of the things transferred, to be fraudulent and therefore void as against creditors of the mortgagor and subsequent purchasers. The courts cannot evade its force and effect by an inquiry into the consideration paid by the purchaser, and the good faith of the transaction.¹

§ 529a. **Colorado.**—Every sale made by a vendor of goods and chattels in his possession or under his control, * * * unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against creditors of the vendor, * * * and this presumption shall be conclusive.²

§ 530. **Connecticut.**—The retention of the possession of personal property by the vendor after a sale raises a presumption of fraud which cannot be repelled by any evidence that the transaction was *bona fide* and for a valuable consideration. This rule is enforced with “undiminished rigor” as a most important rule of public policy.³

§ 531. **Delaware.**—On a bill of sale of goods, the jury must be satisfied that it was an actual and not a pretended sale of them, merely, by the vendor to the purchaser, and that they were delivered into his possession as soon as they reasonably and conveniently could have been under the

¹ Woods v. Bugbey, 29 Cal. 466; Engle v. Marshall, 19 Cal. 329; Richards v. Schroder, 10 Cal. 431; Stevens v. Irwin, 15 Cal. 504; Lay v. Neville, 25 Cal. 552; Hesthal v. Myles, 53 Cal. 623.

The same rule applies to chattel mortgages. Tregear v. Etiwanda Water Co., 76 Cal. 537.

² Gen. Stat. § 1523. Same rule as to chattel mortgages. Cook v. Mann, 6 Colo. 21; Sweeney v. Coe, 12 Colo. 485.

³ Capron v. Porter, 43 Conn. 383; Osborne v. Tuller, 14 Conn. 529; Norton v. Doolittle, 32 Conn. 405; Elmer v. Welch, 47 Conn. 56; Hull v. Sigsworth, 48 Conn. 258; Hatstat v. Blakeslee, 41 Conn. 301; Seymour v. O’Keefe, 44 Conn. 128; Meade v. Smith, 16 Conn. 346; Kirtland v. Snow, 20 Conn. 23; Lake v. Morris, 30 Conn. 201; Hall v. Gaylor, 37 Conn. 550. Whether there has been, in fact, a retention of possession by the vendor, is a question for the jury. Lake v. Morris, 30 Conn. 201. Same rule as to chattel mortgages. Bishop v. Warner, 19 Conn. 460.

circumstances, with the exercise of due diligence and attention on the part of the purchaser.¹

§ 532. **Florida.**—Fraud may be inferred from the facts and circumstances, from the character of the contract, or from the condition and circumstances of the parties; that is, whether the creditor keeps the bill of sale, or retains the possession of the goods, or a part of them, and whether he parts with the absolute dominion over them.²

§ 533. **Illinois—Warehouse Receipts.**—As to subsequent purchasers without notice and creditors, there must be an actual delivery of the personal property to consummate the sale; but this rule has its exceptions, as in case of warehouse receipts.

Usage has made the possession of such documents equivalent to the possession of the property itself.³

§ 534. **Iowa.**—This question is controlled by statute. No sale of personal property, where the vendor retains actual possession, is valid against existing creditors without notice, unless the transaction is witnessed by an instrument duly acknowledged and filed for record.⁴

For the mortgagor to hold possession of the personal property is only *prima facie* fraud, which may be rebutted or explained.⁵

¹Taylor v. Richardson, 4 Houst. (Del.) 300. A statute controls this question. Rev. Stat. ch. 63, § 4.

²Smith v. Hines, 10 Fla. 258; Gibson v. Love, 4 Fla. 217. Same rule as to chattel mortgages. Logan v. Logan, 22 Fla. 561.

³Broadwell v. Howard, 77 Ill. 305; Thompson v. Wilhite, 81 Ill. 356; Lefever v. Mires, 81 Ill. 456; Ticknor v. McClelland, 84 Ill. 471; Allen v. Carr, 85 Ill. 388; Richardson v. Rardin, 88 Ill. 124; Curren v. Bernard, 6 Ill. App. 34; Thompson v. Yeck, 21 Ill. 73; Rozier v. Williams, 92 Ill. 187; Johnson v. Holloway, 82 Ill. 334; Greenbaum v. Wheeler, 90 Ill. 296; Hart v. Wing, 44 Ill. 141; Davis v. Ransom, 18 Ill. 396; Thornton v. Davenport, 1 Scam. (Ill.) 296; Young v. Bradley, 68 Ill. 553; Lewis v. Swift, 54 Ill. 436; Ketchum v. Watson, 24 Ill. 591; Powers v. Green, 14 Ill. 387; McCormick v. Hadden, 37 Ill. 370; Burnell v. Robertson, 5 Gilm. (Ill.) 282; Jennings v. Gage, 13 Ill. 610. Same rule as to chattel mortgages. Dunning v. Mead, 90 Ill. 376.

⁴Boothby v. Brown, 40 Iowa 104; Prather v. Parker, 24 Iowa 26; Hesser v. Wilson, 36 Iowa 152; Sutton v. Ballou, 46 Iowa 517.

⁵Smith v. McLean, 24 Iowa 322; Clark v. Hyman, 55 Iowa 14; Bolton v. Lambert, 72 Iowa 483.

§ 535. **Kentucky.**—Possession must accompany the title in sale of movable property, or the sale will be, *per se*, fraudulent and void in law as to subsequent purchasers and creditors of the vendor, even though the contract contains a stipulation that the seller is to retain possession until a future day.¹

§ 536. **Missouri.**—There must be a complete change of dominion and control over the personal property sold, and some act which will operate as a divestiture of title and possession from the vendor and transference into the vendee.²

A mortgage authorizing the mortgagor to retain possession does not alone, under the statute,³ invalidate a recorded mortgage; and there is no implied reservation of power of sale in the mortgagor, growing out of the nature of the property. If sales have been made after the execution of such mortgage, it should be left to the jury to determine whether the sales were made in pursuance of an agreement or understanding between the parties. If there was, the mortgage would be fraudulent.⁴

§ 537. **Nevada.**—The sale of goods and chattels must be accompanied by change of possession and immediate delivery; otherwise it shall be conclusive evidence of fraud, as against creditors of the vendor or subsequent purchasers in good faith.⁵

§ 538. **Pennsylvania.**—The sale of chattels will be valid against creditors, where they either pass to the vendee or the

¹ *Morton v. Ragan*, 5 Bush (Ky.) 334; *Brummel v. Stockton*, 3 Dana (Ky.) 135; *Robbins v. Oldham*, 1 Duvall (Ky.) 28; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11; *Bradley v. Buford*, *Sneed* (Ky.) 12. This rule does not apply to mortgages. As to chattel mortgages, see *Loth v. Carty*, 85 Ky. 591.

² *Claffin v. Rosenberg*, 42 Mo. 439; *Rocheblane v. Potter*, 1 Mo. 561; *Foster v. Wallace*, 2 Mo. 231; *Sibley v. Hood*, 3 Mo. 290; *King v. Bailey*, 6 Mo. 575; *Shepherd v. Trigg*, 7 Mo. 151; *Lesem v. Herriford*, 44 Mo. 323; *Bishop v. O'Connell*, 56 Mo. 158; *Burgert v. Borchert*, 59 Mo. 80; *Franklin v. Gummersell*, 11 Cent. L. Jour. 132.

³ Wag. Stat. p. 281, § 8; Gen. Stat. 1885, p. 440.

⁴ *Weber v. Armstrong*, 70 Mo. 217. See, also, *Hubbell v. Allen*, 90 Mo. 574.

⁵ Com. Laws, p. 287, § 11. As to chattel mortgages, see *Lawrence v. Burnham*, 4 Nev. 361; *Wilson v. Hill*, 17 Nev. 401.

vendor passes away from them, and leaves them in the exclusive possession of the vendee. Where possession has been retained without any stipulation in the conveyance it is fraud *per se*, and the parties will not be suffered to unravel it and show that what seemed fraudulent was not in fact so.¹

§ 539. **Vermont.**—It is well settled in this State that a sale or pledge of chattels which can be moved, will, if not accompanied by a manifest substantial change of possession, be voidable by attaching creditors.²

ARTICLE III.—BADGES OF FRAUD.

540. At Common Law.

541. In Some States the Mortgagor's Possession May be Explained.

542. Then it is a Question for the Jury.

543. Pennsylvania Rule.

544. Illinois Rule.

545. New York Rule.

546. Nebraska Rule.

547. Minnesota Rule.

548. Prevailing Rule of Registration.

549. Agreements to Defraud.

550. Possession of Exempt Property by the Mortgagor.

551. Exempt Property Being Seized—What Judgment Creditors May Show in Mitigation of Damages.

552. Effect of Insecurity Clause.

553. Waiver of Purchaser's Right to Contest.

554. Actual Possession is Necessary.

§ 540. **At Common Law.**—At common law the continued possession of the mortgagor of personal property, is only *prima facie* evidence of fraud, and may, by evidence, be rebutted.³ When there is an absolute sale with the possession of the chattels, the possession must immediately pass to the

¹Garman v. Cooper, 72 Pa. St. 32; Thompson v. Paret, 94 Pa. St. 275; Pearson v. Carter, 94 Pa. St. 156; McKibbin v. Martin, 64 Pa. St. 352; Wor-man v. Kramer, 73 Pa. St. 378; Davis v. Bigler, 62 Pa. St. 242; Clow v. Woods, 5 S. & R. (Pa.) 275; Dawes v. Cope, 4 Binn. (Pa.) 258; Shaw v. Levy, 17 S. & R. (Pa.) 99; Babb v. Celmsom, 10 S. & R. (Pa.) 419; Bentz v. Rockey, 69 Pa. St. 71; Miller v. Garman, 69 Pa. St. 134. Same rule as to chattel mortgages. Clow v. Woods, 5 S. & R. (Pa.) 275; McKibbin v. Martin, 64 Pa. St. 352; Hower v. Geesaman, 17 S. & R. (Pa.) 251.

²Houston v. Howard, 39 Vt. 54; Daniels v. Nelson, 41 Vt. 161; Rothchild v. Rowe, 44 Vt. 389; Rev. Stat. §§ 1966, 1972.

³Fairbanks v. Bloomfield, 5 Duer (N. Y.) 434.

vendee, but if it be a conditional sale, the possession may continue with the vendor till some future time or until the condition is performed, consistent with the deed.¹

The difference is marked between a conveyance which purports to be absolute and a conveyance which, from its terms, is to leave the possession in the vendor. If, in the latter case, the retaining of possession is evidence of fraud, no mortgage can be made. The possession universally remains with the grantor until the creditor becomes entitled to his money: he either chooses or is compelled to exert his right.²

§ 541. In Some States the Mortgagor's Possession May be Explained.—In some States, where there is a mortgage of chattels, the possession may remain with the mortgagor, irrespective of the registration laws. In a mortgage of personal property, the possession need not be in every instance transferred to the mortgagee; especially in those cases where the possession must necessarily remain with the mortgagor, from the nature of the property mortgaged. If the mortgage be fair and proper, and for a full consideration, then there is no fraud in the transaction. Because the possession has been left with the mortgagor, does not make the transaction *ipso facto* void *per se*. The transaction may be explained to be in conformity with honesty and fair dealing.³

¹ Edwards v. Harben, 2 T. R. 587.

² United States v. Hooe, 3 Cranch (U. S.) 73.

³ Newell v. Warren, 44 N. Y. 244; Butler v. Van Wyck, 1 Hill (N. Y.) 438; Watson v. Williams, 4 Blackf. (Ind.) 26; Hankins v. Ingols, 4 Blackf. (Ind.) 35; Griswold v. Sheldon, 4 N. Y. 581; Gardner v. Adams, 12 Wend. (N. Y.) 297; Hull v. Carnley, 2 Duer (N. Y.) 99; Smith v. Acker, 23 Wend. (N. Y.) 653; Murray v. Burtis, 15 Wend. (N. Y.) 212; Cole v. White, 26 Wend. (N. Y.) 511; Lewis v. Stevenson, 2 Hall (N. Y.) 63; Ross v. Wilson, 7 Bush (Ky.) 29; Head v. Ward, 1 J. J. Marsh. (Ky.) 280; Bucklin v. Thompson, 1 J. J. Marsh. (Ky.) 223; Vernon v. Morton, 8 Dana (Ky.) 247; Lyons v. Field, 17 B. Mon. (Ky.) 543; Hughes v. Cory, 20 Iowa 399; Hombeck v. Vanmeter, 9 Ohio 153; Pierce v. Stevens, 30 Me. 184; Googins v. Gilmore, 47 Me. 9; Reed v. Jewett, 5 Me. 96; Smith v. Putney, 18 Me. 87; Lunt v. Whitaker, 10 Me. 310; Conrad v. Atlantic Ins. Co., 1 Pet. (U. S.) 386; Hoit v. Remick, 11 N. H. 285; Adams v. Wheeler, 10 Pick. (Mass.) 199; North v. Crowell, 11 N. H. 251; Macomber v. Parker, 14 Pick. (Mass.) 497; Runyon v. Groshen, 12 N. J. Eq. 86; Merrill v. Dawson, Hemp. C. C. 563; Pyle v. Warren, 2 Nebr. 241; Magee v. Carpenter, 4 Ala. 469; Killough v. Steele, 1 St. & P. (Ala.) 262; Almy v. Wilber, 2 Wood. & M. C. C. 371; Bissell v. Hopkins, 3 Cow. (N. Y.) 166.

§ 542. Then it is a Question for the Jury.—In such case the continued possession of the vendor or mortgagor, as evidence of fraud, is a question for the jury.¹ It is a question of intent to be settled by them as a question of fact,² even though the evidence of good faith and absence of intent to defraud is uncontradicted.³ The court will not, except in very glaring cases, set aside the verdict of the jury.⁴

§ 543. Pennsylvania Rule.—It is essential to the validity of a chattel mortgage in this State that an absolute delivery be made to the mortgagee. But in this State mortgages of chattels are mere pledges and are not valid against creditors and third persons unless the mortgagee takes possession, or what is equivalent thereto, of the mortgaged property.⁵ A statement upon the face of the mortgage that the mortgagor may remain in possession is not sufficient to make it valid, and will be regarded as fraudulent *per se*.⁶

§ 544. Illinois Rule.—In this State, if the mortgaged property remains with the mortgagor, it makes the transaction fraudulent *per se*, unless the retention be consistent with the terms of the mortgage.⁷ The mortgagor may retain possession, where it is provided in the instrument itself, when properly executed, acknowledged and recorded.⁸

¹Ingalls v. Herrick, 108 Mass. 351; Mead v. Noyes, 44 Conn. 487; Thompson v. Blanchard, 4 N. Y. 303; Griswold v. Sheldon, 4 N. Y. 581; Davis v. Turner, 4 Gratt. (Va.) 422; Cutter v. Copeland, 18 Me. 127; Tilson v. Terwilliger, 56 N. Y. 273; Smith v. Welch, 10 Wis. 91; Allen v. Cowan, 23 N. Y. 502; Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Warner v. Norton, 20 How. (U. S.) 460; Scott v. Winship, 20 Ga. 430; Chamberlain v. Stern, 11 Nev. 268; Patten v. Smith, 4 Conn. 450; Brunswick v. McClay, 7 Nebr. 137; Maney v. Killough, 7 Yerg. (Tenn.) 440; Rowley v. Rice, 11 Met. (Mass.) 333; Swift v. Hart, 12 Barb. (N. Y.) 530; Fuller v. Acker, 1 Hill (N. Y.) 473.

²Miller v. Pancoast, 29 N. J. L. 250.

³Blaut v. Gabler, 77 N. Y. 461.

⁴Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Potter v. Payne, 21 Conn. 360; Oliver v. Eaton, 7 Mich. 108; Butler v. Miller, 1 N. Y. 496; Bishop v. Cook, 13 Barb. (N. Y.) 326; Swift v. Hart, 12 Barb. (N. Y.) 530; Smith v. Smith, 24 Me. 555; Googins v. Gilmore, 47 Me. 9.

⁵Bismark Build. Asso. v. Bolster, 92 Pa. St. 123.

⁶Clow v. Woods, 5 S. & R. (Pa.) 275.

⁷Thornton v. Davenport, 1 Scam. (Ill.) 296; Reed v. Eames, 19 Ill. 594; Constant v. Matteson, 22 Ill. 546; Burnham v. Muller, 61 Ill. 453.

⁸Koplin v. Anderson, 88 Ill. 120; Hammers v. Dole, 61 Ill. 307; Greenbaum v. Wheeler, 90 Ill. 296.

§ 545. **New York Rule.**—A legal presumption of fraud arises, though the mortgage is duly filed for record, when the mortgagor retains possession of the mortgaged property. The recording of the chattel mortgage is not equivalent to a change of possession and actual delivery of the chattels. This statute for recording chattel mortgages has not repealed the statute concerning fraudulent conveyances. Continued possession by the mortgagor is the highest presumption of fraudulent intent, which may be rebutted by evidence of good faith.¹

§ 546. **Nebraska Rule.**—In a controversy between the mortgagee and creditors of the mortgagor concerning the property mortgaged, found in the possession of the latter, evidence showing that the mortgage was made in good faith, without intent to defraud creditors, is imperatively required to overcome the legal presumption of fraud arising from such possession.²

§ 547. **Minnesota Rule.**—The statute requiring the filing of chattel mortgages, when the mortgagor retains possession of the chattels mortgaged, does not make the filing of the mortgage legally equivalent to actual delivery and continued change of possession; it merely adds another to the grounds on which a mortgage of personal chattels shall be void. This is in accord with the New York rule.³

§ 548. **Prevailing Rule of Registration.**—The statutes of the various States authorizing a stipulation in a chattel mortgage for a retention of possession by the mortgagor, make such retention in compliance with the terms of the mortgage equivalent to a change of possession, and when the mortgage is duly filed or recorded it is not, *per se*, fraudulent, or even

¹ Wood v. Lowry, 17 Wend. (N. Y.) 492; Meech v. Patchin, 14 N. Y. 71; Thompson v. Van Vechten, 5 Abb. Pr. 458; Smith v. Acker, 23 Wend. (N. Y.) 653; Dutcher v. Swartwood, 15 Hun (N. Y.) 31; Otis v. Sill, 8 Barb. (N. Y.) 102; Gregory v. Thomas, 20 Wend. (N. Y.) 17.

² Brunswick v. McClay, 7 Nebr. 187; Pyle v. Warren, 2 Nebr. 241; Stat. ch. 25, §§ 11, 14, 15.

³ Horton v. Williams, 21 Minn. 187.

prima facie evidence of fraud, as against creditors or subsequent purchasers.¹

§ 549. **Agreements to Defraud.**—When agreements are made by the parties to the mortgage to hinder and delay creditors, the law then imputes to such agreements fraudulent purposes, and therefore they are held null and void as to the creditors of the mortgagor.²

§ 550. **Possession of Exempt Property by the Mortgagor.**—Though the possession and use of personal property, after a conveyance, constitutes a strong badge of fraud, yet if such property be exempt from execution, the presumption of fraud is necessarily repelled.³

§ 551. **Exempt Property Being Seized—What Judgment Creditors May Show in Mitigation of Damages.**—When it appears that the chattels mortgaged are exempt from sale or execution, judgment creditors, or their representatives, may show as against the mortgagee, in mitigation of damages, that the mortgage was not given to secure any debt, and that nothing is due or to become due thereon.

¹ *Frankhouser v. Ellett*, 22 Kans. 127; *Robinson v. Elliott*, 22 Wall. 513; *Guy v. Bidwell*, 7 Mich. 521; *People v. Bristol*, 35 Mich. 28; *Hughes v. Cory*, 20 Iowa 399; *Smith v. McLean*, 24 Iowa 322; *Briggs v. Parkman*, 2 Met. (Mass.) 258; *Jones v. Huggeford*, 3 Met. (Mass.) 515; *Googins v. Gilmore*, 47 Me. 9; *Hunter v. Corbett*, 7 Upp. C. Q. B. 75; *Bullock v. Williams*, 16 Pick. (Mass.) 33; *Forbes v. Parker*, 16 Pick. (Mass.) 462; *Shurtleff v. Willard*, 19 Pick. (Mass.) 211; *Miller v. Whitson*, 40 Mo. 97; *Harrington v. Brittan*, 23 Wis. 541; *Call v. Gray*, 37 N. H. 428; *Golden v. Cockril*, 1 Kans. 259.

² *Robinson v. Elliott*, 22 Wall. (U. S.) 513; *Collins v. Myers*, 16 Ohio 547; *Freeman v. Rawson*, 5 Ohio St. 1; *Harman v. Abbey*, 7 Ohio St. 218; *Griswold v. Sheldon*, 4 Comst. (N. Y.) 581; *Paget v. Perchard*, 1 Esp. 205; *Wordall v. Smith*, 1 Campb. 332; *Lang v. Lee*, 3 Rand. (Va.) 410; *Addington v. Etheridge*, 12 Gratt. (Va.) 436; *Wood v. Lowry*, 17 Wend. (N. Y.) 492; *Stoddard v. Butler*, 20 Wend. (N. Y.) 507; *Edgell v. Hart*, 13 Barb. (N. Y.) 380; *Russell v. Winne*, 37 N. Y. 591; *Coburn v. Pickering*, 3 N. H. 415; *Ranlett v. Blodgett*, 17 N. H. 298; *Putnam v. Osgood*, 52 N. H. 148; *Horton v. Williams*, 21 Minn. 187; *Place v. Langworthy*, 13 Wis. 629; *Steinart v. Deuster*, 23 Wis. 136; *Bishop v. Warner*, 19 Conn. 460; *Davies v. Ransom*, 18 Ill. 396; *Barnett v. Fergus*, 51 Ill. 352; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 Mo. 269; *Armstrong v. Tuttle*, 34 Mo. 432; *Hower v. Geesaman*, 17 Serg. & R. (Pa.) 251.

³ *Patten v. Smith*, 4 Conn. 450; *Vaughn v. Thompson*, 17 Ill. 78; *Derby v. Weyrich*, 8 Nebr. 174; *Foster v. McGregor*, 11 Vt. 595; *Dundas v. Dutens*, 1 Ves. Jr. 196; *McCarthy v. Gould*, 1 B. & Beat. 390; *Nantes v. Corrock*, 9 Ves. 182; *Rider v. Kidder*, 10 Ves. 360; *Guy v. Pearkes*, 18 Ves. 196; *Bond v. Seymour*, 2 Pinn. (Wis.) 105; *Dreutzer v. Bell*, 11 Wis. 114; *Carhart v. Harshaw*, 45 Wis. 340; *Dart v. Woodhouse*, 40 Mich. 399; *Jewett v. Fink*, 47 Wis. 446.

Nothing is due the mortgagee. There never was any actual liability or obligation on the part of the mortgagor to pay the debt, or if there ever was, such liability has been extinguished and discharged.

The court says, per Cole, J.: "In this action between the plaintiff and the creditor of the mortgagor we can see no legal objection to showing in mitigation of damages that the mortgage debt was extinguished, or did not in fact exist, even if the horse, when the levy was made, was exempt by law from sale on execution; for upon what principle is the plaintiff allowed to recover more damages than he has actually sustained by the levy and sale under the execution? It being, therefore, competent to show these facts in mitigation of damages, we must assume * * * that no amount was due the plaintiff upon the chattel mortgage set up in the complaint, for principal and interest."¹

§ 552. **Effect of Insecurity Clause.**—A clause authorizing the mortgagor to retain possession until the mortgagee deems himself insecure does not render the instrument void, if executed in good faith and valid in all other respects.² Nor does a provision in a deed of trust of personal property authorizing a sale of the property mortgaged, within a certain time, at the instance of the grantor, render the deed fraudulent.³

§ 553. **Waiver of Purchaser's Right to Contest.**—The right of a *bona fide* purchaser of goods to contest the validity of a prior mortgage on the ground of continuance of possession in the mortgagor, is one strictly personal to him. In a suit by the purchaser against the vendor for fraud in concealing the existence of the prior mortgage, the vendor cannot claim that the purchaser might have successfully contended against the mortgagee's demand for the goods. Thus, where one having mortgaged certain goods, afterwards sold them,

¹ *Jewett v. Fink*, 47 Wis. 446.

² *Frost v. Mott*, 34 N. Y. 251.

³ *Sipe v. Earman*, 26 Gratt. (Va.) 563; *Dubose v. Dubose*, 7 Ala. 235.

fraudulently concealing the existence of the mortgage, and the purchaser voluntarily surrendered them to the mortgagee on his demanding the goods, it was held that, in an action for the fraud, though the purchaser might have successfully contended against the mortgagee's claim by reason of possession remaining in the mortgagor, yet the omission to do so is no defense.¹

A defense against a claim of a mortgagee on the ground of being a *bona fide* purchaser, is, in all cases, a matter of right, strictly personal to such purchaser, and cannot be thrown upon him by the mortgagor as a matter of obligation. This principle is seen in many cases; thus, a man innocently becomes surety in a usurious obligation, and takes a counter security from his principal; the surety may waive his defense of usury, pay the debt, and then recover against his principal.²

A defense under the statute of frauds, on the ground that a collateral contract to pay was by parol, is personal to the guarantor, and he is not bound to avail himself of it as a defense for the benefit of a third person.³ And a man having a lien may waive it, and is not bound to insist upon it for the benefit of the general owner, who has sold the goods to another.⁴

§ 554. **Actual Possession is Necessary.**—Actual possession is necessary. Thus, if the mortgagee leaves the chattels in the possession of the mortgagor as his agent, it is not an actual change of possession within the meaning of the fifth section of the statute of frauds of New York.⁵

The fact that a party testifies, in a general way, that he took possession or was in possession, will have no weight when the evidence shows precisely what was done.⁶

¹ *Rust v. Morse*, 2 Hill (N. Y.) 655, opinion by Cowen, J.

² *Bassett and Prowe's Case*, 2 Leon 166; *Robinson v. May*, Cro. Eliz. 588; *Button v. Downham*, Cro. Eliz. 643.

³ *Cahill v. Bigelow*, 18 Pick. (Mass.) 369.

⁴ *Barrow v. West*, 23 Pick. (Mass.) 270.

⁵ *Hanford v. Artcher*, 4 Hill (N. Y.) 271.

⁶ *Steele v. Benham*, 84 N. Y. 634.

ARTICLE IV.—FRAUD IN GENERAL AS APPLICABLE TO
CHATTEL MORTGAGES.

- 555. Statutes Declaratory of the Common Law.
- 556. Statutes Avoiding Fraudulent Conveyances.
- 557. Twyne's Case.
- 558. Fraud May be Proved by Circumstances.
- 559. Who May Attack.
- 560. Rights of Creditors at Large.
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- 562. Fraudulent Intent of the Mortgagor Known to the Mortgagee.
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- 569. Stating the Consideration More than the Debt.
- 570. The Mortgagee Not Affected by the Acts of the Mortgagor.
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- 573. Mortgages Given Under Duress.
- 574. Void When Against Public Policy.
- 575. When Fraudulent in Part.
- 576. When Valid in Part and Void in Part.
- 577. When Valid in Part—Fraudulent Intent.
- 578. Independent Valid Transactions.
- 579. When a Question for the Jury.

§ 555. **Statutes Declaratory of the Common Law.**—By the rules of the common law, all conveyances made in fraud of creditors were regarded as voidable at the instance of such creditors.¹

The statutes of Elizabeth,² avoiding fraudulent conveyances, were merely declaratory of the common law.³

§ 556. **Statutes Avoiding Fraudulent Conveyances.**—Statutes were passed to formulate and declare the principles of the common law, to repress fraudulent conveyances.⁴

The statute of 13 Eliz. ch. 5, perpetuated by 29 Eliz.,

¹ *Curtis v. Leavitt*, 15 N. Y. 124; *Clements v. Moore*, 6 Wall. (U. S.) 299; *Blackman v. Wheaton*, 13 Minn. 326; *Brice v. Myers*, 5 Ohio 122; *Baker v. Humphrey*, 101 U. S. 499.

² 13 Eliz. ch. 5 (1570).

³ *Clements v. Moore*, 6 Wall. (U. S.) 312; *Davis v. Turner*, 4 Gratt. (Va.) 429.

⁴ 50 Edw. III. ch. 6 (1376); 2 Rich. II. Stat. 2, ch. 3 (1379); 3 Hen. VII. ch. 4 (1487); 13 Eliz. ch. 5 (1570); 29 Eliz. ch. 5 (1587).

has been re-enacted or copied in nearly every State of this country, and has been adopted as the basis of jurisprudence upon the subject of fraudulent conveyances. In some of the States this statute has never been enacted, but antedating, as this statute does, the settlement of this country, and being mainly, if not wholly, declaratory of the common law, which sets a face of flint against frauds in every shape, it constitutes the basis of American jurisprudence on these subjects, and is, when not specially enacted, a part of the unwritten law.¹

By the provisions of this statute all conveyances and dispositions of property, real and personal, made with intent to defraud creditors, are null and void as against creditors.²

§ 557. **Twyne's Case.**³—This is a celebrated case, and has a deep hold in our law. The facts of this case are these: A party owed two others, one of whom brought an action against him to collect his indebtedness. Pending the writ the debtor made a secret conveyance of all his goods and chattels to the other creditor in satisfaction of that debt, but continued in possession, and sold some of the sheep and set his mark upon others, and it was decided to be fraudulent within the act of 13 Eliz. ch. 5, (1) because the gift was general; (2) the donor continued in possession and used the property as his own; (3) it was made in secret; (4) it was made pending the writ, and was not within the proviso, for though it was made on a good consideration, yet it was not *bona fide*. But yet the donor continuing in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money.⁴

§ 558. **Fraud May Be Proved By Circumstances.**—Many circumstances are valuable as evidence of fraud, but these

¹ Story's Eq. § 553; *Gardner v. Cole*, 21 Iowa 209.

² *Drake v. Rice*, 130 Mass. 410; *Roberts' Fraud. Conv.* 554; *Wait's Fraud. Conv.* 19.

³ 3 Rep. 80; 1 Smith's L. Cas. 1.

⁴ Buller's Nisi Prius, p. 258.

circumstances cannot supply the place of finding of the fact that fraud exists. It is not enough to justify a judgment in favor of one who attacks a chattel mortgage, on the ground of fraud, that some of the circumstances recited in the special finding be deemed evidence of fraud, for there is an essential difference between material facts that fraud exists and circumstances which tend to prove it.¹

When the circumstances are so strong as to produce conviction of the truth of the charge of fraud, although there may remain some doubt, it will be considered sufficient. A jury may properly consider the circumstances that a mortgagee took his mortgage for a larger sum than was actually due him, and knew at the time that the mortgagor was insolvent at the time of the execution of the instrument, and had obtained the goods on credit.²

The rule that fraud must be proved and not inferred does not mean that fraud can be proved only by positive evidence, but that it cannot be established by circumstances that merely raise a suspicion.³

§ 559. **Who May Attack.**—Where a mortgage is executed to another, a third party not being a subsequent purchaser from the mortgagee of the mortgagor, nor a creditor of the mortgagor who has laid hold of the mortgaged property by legal process, is not in position to object to the validity of the mortgage.⁴ Whether or not the mortgagor of chattels, in trespass against him by the mortgagee for wrongfully taking and conversion of the property, could show in mitigation of damages that the mortgage was given and taken with intent to defraud creditors, it is certain that that defense may be made by judgment creditors or personal representatives of them.⁵ Creditors of the mortgagor and subse-

¹ *Jarvis v. Banta*, 83 Ind. 528; *Louthain v. Miller*, 85 Ind. 161; *Elston v. Caster*, 101 Ind. 426; *Taylor v. Duesterberg*, 109 Ind. 165.

² *Strauss v. Kranert*, 56 Ill. 254.

³ *Bryant v. Simoneau*, 51 Ill. 324; *Sparks v. Mack*, 31 Ark. 666; *Bullock v. Narrott*, 49 Ill. 62; *Rothgarber v. Gough*, 52 Ill. 436.

⁴ *Ellingboe v. Brakken*, 36 Minn. 156; *Tolbert v. Horton*, 31 Minn. 518.

⁵ *Jewett v. Fink*, 47 Wis. 446.

quent purchasers in good faith can alone assail a chattel mortgage under which the mortgagor retains possession.¹

§ 560. **Right of Creditors at Large.**—A mortgage is invalid as against creditors if made with intent to hinder, delay or defraud them, or if not put on file when the goods remain in the mortgagor's possession. It applies to those who become creditors during the interval while the mortgage is not on file, not merely to those who have obtained judgment or levied attachments before filing. But a chattel mortgage cannot be questioned by a creditor at large, except by some process against the property, as of garnishee process. The law being that those who become creditors whilst the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing. Still, no one as creditor at large can question the mortgage. He can only do that by means of some process or proceeding against the property. A garnishee process is such proceeding.²

§ 561. **May be Void, Although Founded on a Valuable Consideration.**—A sale or mortgage, although upon a valuable and sufficient consideration, may be not only constructively but actually fraudulent as against creditors of the vendor or mortgagor, notwithstanding it was, as between the parties to it, a valid security for money borrowed.³

§ 562. **Fraudulent Intent of the Mortgagor Known to the Mortgagee.**—Where it is the intention of a debtor in giving a mortgage to put his property in such a position as to defraud, hinder or delay his creditors, and this intention was known to the mortgagee, some courts hold that the mortgagee is, in law, charged with a participation in the fraud, although he may pay a valuable consideration, and take im-

¹ *Pyle v. Warren*, 2 Nebr. 241; *Wagner v. Jones*, 7 Daly (N. Y.) 375; *Frost v. Mott*, 34 N. Y. 253; *Rinchey v. Stryker*, 26 How. Pr. (N. Y.) 75.

² *Feary v. Cummings*, 41 Mich. 376; *People's Sav. Bank v. Bates*, 120 U. S. 556; *Thompson v. Van Vechten*, 27 N. Y. 568.

³ *Braley v. Byrnes*, 20 Minn. 435; *Twyne's Case*, 3 Rep. 80; 1 Smith's Lead. Cas. 35; *Bridge v. Eggleston*, 14 Mass. 245; *Robinson v. Holt*, 39 N. H. 557.

mediate and open possession. When the mortgagee takes the mortgage with such knowledge of fraud on the part of the mortgagor, the transaction cannot be said to be *bona fide*, however full and valuable the consideration may be.¹

§ 563. **Contrary Doctrine.**—On the contrary, it is held that fraud on the part of the mortgagor does not affect the mortgagee unless he is a party to such fraud, and receives the mortgage with the intent to hinder, delay or defraud the creditors of the mortgagor;² that both parties must participate in the fraud to make the mortgage void as to creditors;³ that where a debt is secured by a mortgage, the intent of the mortgagor being to prevent the property from being attached by other creditors, will not vitiate the mortgage, unless the mortgagee participates in the fraud.⁴

One line of authorities holds that conveyances made by a grantor in fraud of his creditors are valid unless it be shown that the purchaser is not a purchaser for value, and in good faith. Another line of authorities states the effect of the statute to be that conveyances, fraudulent on the part of the grantor, are invalid at the suit of his creditors, unless it be shown that the purchaser is a purchaser for value, and in good faith. The authorities are uniform in declaring that one who attacks a conveyance as fraudulently made must establish the fraud; he has the burden of proof. But there is a conflict when the question arises whether the creditor, by proof of the fraud of the grantor, has made a *prima facie* case against the grantee, entitling him to recover, in the absence of any evidence by his adversary. The rule adopted

¹ Robinson v. Holt, 39 N. H. 557; Twyne's Case, 3 Rep. 80; 1 Smith's Lead. Cas. 35; Blodgett v. Webster, 24 N. H. 91; Kimball v. Thompson, 4 Cush. (Mass.) 441; Bridge v. Eggleston, 14 Mass. 245.

² Cornish v. Dews, 18 Ark. 172; Price v. Masterson, 35 Ala. 483; Fifield v. Gaston, 12 Iowa 218; Smith v. Post, 1 Hun (N. Y.) 516; Prior v. White, 12 Ill. 261; Hessing v. McCloskey, 37 Ill. 341; Miner v. Phillips, 42 Ill. 123; Myers v. Kinzie, 26 Ill. 36; Rust v. Mansfield, 25 Ill. 338.

³ Meixsell v. Williamson, 35 Ill. 529; Herkelrath v. Stookey, 63 Ill. 486.

⁴ McLarren v. Thompson, 40 Me. 284. See, also, Eureka I. & S. Works v. Bresnahan, 66 Mich. 489.

in Massachusetts,¹ New Jersey,² Iowa,³ Wisconsin,⁴ Connecticut⁵ and Maryland⁶ is that the creditor must not only show fraud on the part of the grantor, but participation in or notice of it by the grantee. But other authorities hold that where the fraud of the grantor is established a *prima facie* case is made by the creditor, which must be met by the purchaser by evidence that he is a purchaser in good faith and for value.⁷

Judge Cooper says: "We concur in the views announced by those courts which hold that proof of fraud on the part of the grantor is sufficient to entitle his creditors to subject the property fraudulently assigned, in the absence of evidence showing the claimant to be a purchaser for value and in good faith. We fail to perceive why, in cases of this character, the party assailing the conveyance shall be required to assume the burden of showing participation in the fraud by the purchaser, and the non-payment of value for the property fraudulently conveyed."⁸

The authorities holding that it is the duty of the creditor to establish the fraud of both grantor and grantee, rest upon the rule that fraud is never to be presumed, but must always be proved by the party alleging it. But it is not true that, where a transaction has been shown to be fraudulent on the part of one of the parties to a transfer, it is incumbent on the party claiming or defending against it to show the fraud of the other party claiming under it. Good faith and legality are presumed to exist in reference to the

¹ Bridge v. Eggleston, 14 Mass. 245; Foster v. Hall, 12 Pick. (Mass.) 89.

² Insurance Co. v. Tooker, 35 N. J. Eq. 408; Tantum v. Green, 21 N. J. Eq. 364; Bank v. Northrup, 22 N. J. Eq. 58.

³ Adams v. Foley, 4 Iowa 44; Fifield v. Gaston, 12 Iowa 218.

⁴ Mehlhop v. Pettibone, 54 Wis. 652.

⁵ Partelo v. Harris, 26 Conn. 480.

⁶ Cpoke v. Cooke, 43 Md. 524.

⁷ Rogers v. Hall, 4 Watts (Pa.) 359; Clark v. Depew, 25 Pa. St. 509; Lloyd v. Lynch, 28 Pa. St. 419; Starin v. Kelly, 88 N. Y. 418; Hamilton v. Blackwell, 60 Ala. 545; Gordon v. Tweedy, 71 Ala. 202; Brown v. Hedge, 64 Tex. 396; Miller v. Fraley, 21 Ark. 22; Fullenwider v. Roberts, 4 Dev. & B. (N. Car.) 278; Worthy v. Caddell, 76 N. Car. 82.

⁸ Richards v. Vaccaro, 67 Miss. 516.

ordinary business transactions of life, and the burden is upon him who asserts the contrary; it is otherwise when the transaction is itself unfair, or is shown to be, *prima facie*, illegal.¹

Proof that the purchaser bought for value, the price being adequate, is generally held, in the absence of other evidence showing notice of the fraud, to raise the presumption of good faith.²

In suits by one whose property has been secured by the fraud of the vendee, to recover from another claiming under the fraudulent vendee, it has been uniformly held that proof of the fraud of the first vendee of the property imposes upon the party claiming under him the burden of showing he is a purchaser for value and in good faith.³

§ 564. **Trying to Protect Property.**—When it is shown that the parties to a mortgage executed and received the same for the purpose of placing the mortgaged property beyond the reach of certain creditors of the mortgagor, and the debt for which the mortgage was given was already amply secured by a mortgage on real estate, and the mortgagor did not surrender possession, it is a strong case of fraud.⁴

§ 565. **Two Mortgagees, One of Whom Is Innocent.**—When a mortgage is made to two persons, to secure separate debts, the knowledge of a fraudulent intent of one of them will not affect the rights of the other. The mortgage will be void as to one and good as to the other.⁵

So, when the grantor, with fraudulent intent, makes a trust deed of personalty, some of the beneficiaries knowing of the grantor's fraud and others being innocent, such deed

¹ Whar. Ev. §§ 366, 1248; Biglow on Frauds, 130, 132.

² *Starin v. Kelly*, 88 N. Y. 418; *Shores v. Doherty*, 65 Wis. 153; *Spira v. Hornthall*, 77 Ala. 137.

³ *Bailey v. Bidwell*, 13 Mees. & W. 73; *Fitch v. Jones*, 32 Eng. L. & Eq. 134; *Paton v. Coit*, 5 Mich. 505; *Clark v. Pease*, 41 N. H. 414; *Spira v. Hornthall*, 77 Ala. 137; *Easter v. Allen*, 8 Allen (Mass.) 7; *Morgan v. Morse*, 13 Gray 150; *Haskins v. Warren*, 115 Mass. 514.

⁴ *Crapster v. Williams*, 21 Kans. 109. See, also, *Strohm v. Hayes*, 70 Ill. 41; *Phillips v. Reitz*, 16 Kans. 396; *Herkelrath v. Stookey*, 63 Ill. 486.

⁵ *Smith v. Post*, 1 Hun (N. Y.) 516.

is invalid as to those participating in the wrong and valid as to those that are innocent.¹

§ 566. **Proof of Fraud.**—Facts and circumstances indicating, on the part of the parties to a mortgage, that they intend to place the mortgaged property beyond the reach of legal process, and thereby delay, if not to defeat creditors, constitute fraud, which may overcome the denial of the mortgagee of the fraudulent motive on his part.²

§ 567. **Extrinsic Evidence Necessary.**—If there is any intent, in giving the mortgage, to hinder, delay or defraud creditors, it must be established by extrinsic evidence. The intent is not to be inferred by the court, but becomes a question of fact to be proved.³

§ 568. **Res Gestæ.**—Declarations of the mortgagor while in possession are admissible upon the question of intent, as part of the *res gestæ*.⁴ But where the mortgagor remains in possession, vending and applying such property to his own use, it is improper to admit in evidence the declarations of the mortgagor to defeat the rights acquired by the mortgagee in the property.⁵ So, also, in a trustee process, in which the trustee answers that he has no goods, effects or credits of the defendant in his hands, and that he has a mortgage from the principal defendant of some of the property attached in the action, evidence of the mortgagor's declarations subsequent to the mortgage is not admissible to defeat the title of the mortgagee.⁶

¹ *Troustine v. Lask*, 4 Baxt. (Tenn.) 162.

² *Wheeldon v. Wilson*, 44 Me. 1.

³ *Horton v. Williams*, 21 Minn. 187; *Ewing v. Gray*, 12 Ind. 64; *Maples v. Burnside*, 22 Ind. 139; *Allen v. Wheeler*, 4 Gray (Mass.) 123; *Banfield v. Whipple*, 14 Allen (Mass.) 13; *Green v. Tanner*, 8 Met. (Mass.) 411; *Bagg v. Jerome*, 7 Mich. 145; *Kleine v. Katezenberger*, 20 Ohio St. 110; *Ford v. Williams*, 24 N. Y. 359; *Miller v. Lockwood*, 32 N. Y. 293.

⁴ *City Bank v. Westbury*, 16 Hun (N. Y.) 458; *Newlin v. Lyon*, 49 N. Y. 661.

⁵ *Donaldson v. Johnson*, 2 Chand. (Wis.) 160. See, also, *Bentley v. Wells*, 61 Ill. 59; *Herkelrath v. Stoakey*, 63 Ill. 486; *Brown v. Riley*, 22 Ill. 46; *Bell v. Prewitt*, 62 Ill. 361; *Prior v. White*, 12 Ill. 261; *Wheeler v. McCorristen*, 24 Ill. 40; *Meixell v. Williamson*, 35 Ill. 529.

⁶ *Perkins v. Barnes*, 118 Mass. 484. See, also, *Winchester v. Charter*, 97 Mass. 140; *Hempstead v. Johnston*, 18 Ark. 123; *Cornish v. Dews*, 18 Ark.

§ 569. **Stating the Consideration More Than the Debt.**—The fact that a chattel mortgage is given for a sum slightly in excess of the real debt, is not sufficient to stamp it with fraud, in the absence of a fraudulent intent on the part of the mortgagee.¹ It is not rendered void by the mere fact that the mortgage is given for a larger sum than is due.²

But when the value of the property is more than double the amount of the debt secured, or greatly in excess of it, it is, to say the least, a badge of fraud.³

When the consideration is specified, but the mortgagee claims that the mortgage was for a larger amount, the mortgage is valid as to the mortgagor's creditors only for the sum stated in the instrument.

As between the parties, such a mortgage might be construed as security for the entire debt.⁴

§ 570. **The Mortgagee Not Affected By the Acts of the Mortgagor.**—It has been held that the mortgagee is not affected by the acts of the mortgagor, even though the latter is the agent of the former. So, when the mortgagee gives the mortgagor the mortgage, to have it filed, who requested the clerk to suppress it by hiding it at the bottom of the pile, which was done, this was not the act of the principal and could not avoid the mortgage as to third parties.⁵ But if the mortgage had not been put on file the mortgage would have been invalid.⁶

172; *Merrill v. Dawson*, Hemp. C. C. 563. The mortgagor's declarations are admissible, made at the time of the execution of the mortgage. *Bushnell v. Wood*, 85 Ill. 88; *Potter v. McDowell*, 31 Mo. 62. The burden of proof is upon him who alleges it. *Washington v. Ryan*, 5 Baxt. (Tenn.) 622.

¹ *Van Patten v. Thompson*, 73 Iowa 103; *Frost v. Warren*, 42 N. Y. 204; *Weeden v. Haws*, 10 Conn. 50; *Willison v. Desenberg*, 41 Mich. 156; *Tully v. Harloe*, 35 Cal. 302; *Butts v. Peacock*, 23 Wis. 359; *Blakeslee v. Rossman*, 43 Wis. 116.

² *Hoey v. Pierron*, 67 Wis. 262.

³ *Wright v. Hencock*, 3 Munf. (Va.) 521; *Mitchell v. Beal*, 8 Yerg. (Tenn.) 134; *Anderson v. Hunn*, 5 Hun (N. Y.) 79; *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612; *Bailey v. Burton*, 8 Wend. (N. Y.) 339; *Hawkins v. Alston*, 4 Ired. Eq. (N. Car.) 137.

⁴ *Mueller v. Provo* (Mich.), 45 N. W. Rep. 498.

⁵ *Case v. Jewett*, 13 Wis. 498.

⁶ *Low v. Pettengill*, 12 N. H. 337.

§ 571. **Rights of Junior Mortgagee.**—A junior mortgagee, in order to defeat a prior mortgage for fraud, must show by evidence *dehors* that the instrument itself is void.¹ So, when he proves that a prior mortgage of the same property was fraudulent as to creditors, he is entitled to a judgment setting it aside.² And a purchaser under a junior mortgage sale may impeach the validity of the prior mortgage.³

But a junior mortgagee, as a simple creditor of the mortgagor, not having by legal process acquired a lien upon or property in the mortgaged chattels, and not seeking relief in aid of any legal process against the property, cannot attack the prior mortgage for fraud, nor is his right as a creditor to assail the prior mortgage for fraud strengthened by the fact that he is a subsequent mortgagee.⁴

The fact that the junior mortgagee is a creditor gives him no property in nor lien upon the goods of his debtor. Only by legal process can he as a creditor appropriate the property to himself, or subject it to be applied to the satisfaction of his demand. Neither does an assumed conveyance of property by the debtor, whether made for the purpose of security or of payment, place the junior mortgagee in a position to avail himself of the right as a creditor to assail the prior conveyance as being made in fraud of creditors; and thus defeat the title of the prior mortgagee.⁵

§ 572. **A Void Mortgage Cannot be Made Valid.**—No valid use can be made of a void chattel mortgage. It may hold the parties to it, but as to third persons it cannot be made effective.⁶

¹ *Baskins v. Shannon*, 3 N. Y. 310; *Wray v. Freddirke*, 43 N. Y. Superior Ct. 335.

² *Anderson v. Hunn*, 5 Hun (N. Y.) 79.

³ *White v. Graves*, 68 Mo. 218.

⁴ *Massey v. Gorton*, 12 Minn. 145; *Southard v. Benner*, 72 N. Y. 424; *Jones v. Graham*, 77 N. Y. 628.

⁵ *Stone v. Vanheythuysen*, 11 Hare 126; *Liggat v. Morgan*, 2 Leigh (Va.) 84; *Fox v. Willis*, 1 Mich. 321; *Grimsley v. Hooker*, 3 Jones Eq. (N. Car.) 4.

⁶ *Mittnacht v. Kelly*, 3 Keyes (N. Y.) 407; *Harvey v. Crane*, 2 Biss. C. C. 496; *Smith v. Ely*, 10 Bank. Reg. 260; *Bank v. Hunt*, 11 Wall. (U. S.) 391; *Grover v. Wakeman*, 11 Wend. (N. Y.) 187; *Putnam v. Osgood*, 52 N. H.

To render a mortgage valid it must be given in good faith for an honest purpose, to secure a debt, and without any intent to hinder or defraud creditors. This cannot be true when the object in part, or as part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design of the parties cannot be confined to one particular parcel of the property. Entire honesty and good faith are necessary to render it valid, and whenever it indisputably appears that one object is to defraud creditors, the entire instrument is, in law, void. It is not analogous to a class of cases which have held that a part of the instrument is valid and not dependent upon other parts which are invalid, and may be enforced.

The fraudulent intent makes the instrument wholly void, notwithstanding it may include property as to which it would be valid if it could be regarded as a mortgage of that only.¹

So, where a mortgage of personal property, which as to some portions of the debt thereby secured is in contravention of the insolvent laws, it is wholly void.²

§ 573. **Mortgages Given Under Duress.**—Mortgages given under duress are void. Thus, a creditor fraudulently obtained possession of his debtor's chattels, and, refusing to surrender possession, compelled the owner to execute a note and then a chattel mortgage to secure the note. This action was illegal, and the instruments wholly void.³

§ 574. **Void When Against Public Policy.**—When a mortgage is given which is in contravention of the public good and against public policy, it is void. Thus, by threats of arrest, a party was induced to give a chattel mortgage. It was decided that the instrument was void, not only because

148; *Coolidge v. Melvin*, 42 N. H. 510; *Catlin v. Currier*, 1 Saw. C. C. 7; *Place v. Langworthy*, 13 Wis. 629.

¹ *Russell v. Winne*, 37 N. Y. 591; *Burke v. Murphy*, 27 Miss. 167.

² *Denny v. Dana*, 2 Cush. (Mass.) 160. See Sections 575, 576.

³ *Lightfoot v. Wallis*, 12 Bush (Ky.) 498. See, also, *Spaids v. Barrett*, 11 Am. Rep. 10.

given under duress, but also because it is against public policy to permit such an abuse of process.¹

§ 575. **When Fraudulent In Part.**—A trust deed of chattels, colorable and fraudulent as to part, is fraudulent and void as to the whole of the articles of property contained in it.² Or, if the intent of both parties be to delay, hinder or defraud the mortgagor's creditors, it is void and cannot be effective to secure an actual debt as part of the consideration.³ When a mortgage is good in part and bad in part as against a provision of the statute, it is void *in toto*, and no interest passes to the grantee under the part which is good.⁴

§ 576. **When Valid In Part and Void In Part.**—Whether a mortgage can be valid in part and void in part is a question not uniformly decided by the courts. But where there is no fraudulent intent connected with the transaction, either in law or in fact, it would seem that such a mortgage would be upheld. Thus, a chattel mortgage, otherwise valid as to part of the property described in it, is not rendered void as to such property by reason of its professing to mortgage other property, as to which it is inoperative. Accordingly, a mortgage of all the goods of a special description then in a store, or thereafter to be brought there, though void as to the latter, in New York, may be good as to the rest. The court says that the mortgage was not fraudulent upon its face; that it was of all the property of a particular description in a certain store, and that was sufficiently definite as to the property on hand. So far as it professed to convey property which the mortgagor afterwards purchased and put into the store, it was inoperative. But the circumstance that the mortgagor attempted to mortgage property which he did

¹ Bane v. Detrick, 52 Ill. 19.

² Summerville v. Horton, 4 Yerg. (Tenn.) 541; Claflin v. Foley, 22 W. Va. 434.

³ Weeden v. Hawes, 10 Conn. 50; Beall v. Williamson, 14 Ala. 55.

⁴ Campbell v. Clarke, 14 Johns. (N. Y.) 458; Mackie v. Cairns, 5 Cow. (N. Y.) 547.

A mortgage of personal property, which, as to some portions of the chattels thereby secured, is in contravention of the insolvent laws, is wholly void as to all. Denny v. Dana, 2 Cush. (Mass.) 160.

not possess, did not render invalid the conveyance of that which he owned and was entitled to mortgage.¹

So, a mortgage covering the fixtures and furniture of a drug store, and also the stock of drugs, will not be held void as to the fixtures and furniture, because, as to the stock of drugs, it is invalidated by the fact that the mortgagor, with the consent of the mortgagee, remained in possession and continued his usual business of selling the drugs.²

§ 577. **When Valid In Part—Fraudulent Intent.**—But when fraudulent intent enters into the transaction and is confined to part only of the property mortgaged, it makes the mortgage void as to all. This fraudulent intent as to part vitiates the entire instrument, even when it describes property which would make it valid if taken alone, and which is mortgaged to secure a *bona fide* debt. If the deed of trust of personal property is, because of its provisions, in respect of the goods and the credits, void, it is void as to every other kind of property embraced in it.³

If a mortgage is made without a fraudulent intent, and the mortgagee subsequently consented to a sale of all or a part of the mortgaged property, such a sale would discharge the lien of the mortgage on the articles sold, but would not operate respectively so as to avoid the mortgage itself.⁴

The weight of authority is, that a conveyance, in the absence of actual fraud, is bad to the extent only of the property out of which a trust is created to the use of the grantor; and the creditors have nothing to complain of with respect to the disposition of the remainder, since it does not

¹ Gardner v. McEwen, 19 N. Y. 123, per Denio, J.; Van Heusen v. Radcliff, 17 N. Y. 580.

² Donnell v. Byern, 69 Mo. 468, per Norton, J. See, also, Weeden v. Hawes, 10 Conn. 50; Langdon v. Phelps, 52 How. Pr. (N. Y.) 387; In re Kahley, 2 Biss. C. C. 383; Barnett v. Fergus, 51 Ill. 352; In re Kirkbride, 5 Dill. C. C. 116; State v. Tasker, 31 Mo. 445; Voorhis v. Langsdorf, 31 Mo. 451.

³ Harman v. Hoskins, 56 Miss. 142; Russell v. Winne, 37 N. Y. 591; Goodrich v. Downs, 6 Hill (N. Y.) 438; Goodhue v. Berrien, 2 Sand. Ch. (N. Y.) 630; Jackson v. Packard, 6 Wend. (N. Y.) 415.

⁴ Horton v. Williams, 21 Minn. 187; Russell v. Winne, 37 N. Y. 591; Klapp v. Shirk, 13 Pa. St. 589.

hinder, delay or defeat them in any legal sense, unless that disposition was in the effectuation of an actual or necessarily imputed fraudulent intent which taints the whole transaction with actual fraud. So, it is held that, in the absence of an actual intent by a chattel mortgagee to assist the mortgagor in defrauding his creditors, the mortgage covering a stock of goods and fixtures, though constructively void as to the stock, by reason of the mortgagor's right to continue in possession and sell the goods, is valid as to the fixtures, to which the power of sale does not apply.¹

§ 578. **Independent Valid Transactions.**—Selling or taking possession of the property under and by virtue of a fraudulent mortgage cannot of necessity make it valid. The title remains fraudulent and voidable still as against creditors.² The mortgagee's possession under the mortgage is as good or as bad as the mortgage itself, and the court cannot transmute a void mortgage into a valid pledge.³ But if the mortgagee repudiates the instrument and obtains a pledge of the property, accompanied by delivery and open change of possession, and by a distinct agreement subsequent to and independent of the mortgage, his rights will be protected as against the other creditors.⁴

§ 579. **When a Question for the Jury.**—When a mortgage is colorable and the transaction is equivocal, and there is conflicting evidence as to the good faith of the parties, or its validity rests upon extrinsic facts, then its validity must be a question for the jury.⁵

¹ *Hayes v. Westcott* (Ala.), 8 South. Rep. 337.

² *Smith v. Ely*, 10 Bank. Reg. 563.

³ *Blakeslee v. Rossman*, 43 Wis. 116. See, also, *In re Forbes*, 5 Biss. C. C. 510; *Robinson v. Elliott*, 22 Wall. (U. S.) 513; *Stimson v. Wrigley*, 86 N. Y. 332; *Janvrin v. Fogg*, 49 N. H. 340. But see *Baldwin v. Flash*, 59 Miss. 66.

⁴ *Pettee v. Dustin*, 58 N. H. 309; *First Nat. Bank v. Anderson*, 24 Minn. 435; *Baldwin v. Flash*, 58 Miss. 593; *Brown v. Platt*, 8 Bosw. (N. Y.) 324.

⁵ *Weaver v. Reilly*, 10 N. Y. Week. Dig. 241.

ARTICLE V.—FRAUDULENT CONVEYANCES UNDER THE
ASSIGNMENT AND INSOLVENT LAWS.

- 580. Assignments in the Nature of Mortgages.
- 581. When the Statute of Frauds Does Not Apply.
- 582. The Trustee May Conduct the Business.
- 583. The Mortgagee May Complete the Manufacture of Unfinished Goods.
- 584. Mortgagor Using the Property as His Own.
- 585. Preferences—Fraudulent Intent.
- 586. In Nebraska.
- 587. In Kansas
- 588. In South Carolina.
- 589. In Alabama.
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§ 580. **Assignments in the Nature of Mortgages.**—An assignment by a debtor of his personal property, with the reservation to himself of any surplus, may be, in its effect, a chattel mortgage.¹

The reservation of the surplus is no evidence of a fraudulent intent.² But if such assignment contains a reservation that the property shall be used for the benefit of the debtor, and not for the benefit of his creditors, it is fraudulent *per se*, and absolutely void.³

§ 581. **When the Statute of Frauds Does Not Apply.**—A mortgage upon goods and chattels designed to give a lien upon the same as security for the payment of a debt, although it necessarily creates a trust as to the surplus, yet the trust is not the object of the assignment, nor is it such a

¹ Winner v. Hoyt, 66 Wis. 227.

² McClelland v. Remsen, 36 Barb. (N. Y.) 622.

³ Owen v. Arvis, 26 N. J. L. 22; Nat. Bank v. Sprague, 21 N. J. Eq. 530; Sheldon v. Dodge, 4 Denio (N. Y.) 217.

trust as renders the conveyance void as against creditors of the vendor. The statute of frauds does not apply to mortgages, whether they contain the usual defeasance upon their face and thus create an open trust, or exist in the form of an absolute conveyance with the understanding that they are intended as mortgages, and thus create a secret trust.¹

The statute does not prohibit the making of chattel mortgages, nor make such mortgages void, because the mortgagee stipulates to do what the law requires him to do, that is, to restore the surplus after sale of as much as shall be sufficient to discharge the debt.²

The trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed subject to the trust, but a specific lien on it. The residue interest of the assignor may, according to its nature, be reached by the creditors of the assignor. The State statute does not apply to cases in which conveyances are made primarily and principally for the use of the grantee, and where the reservation to the grantor is merely incidental and partial.³

§ 582. **The Trustee May Conduct the Business.**—A provision in a trust deed of personal property that the trustee may continue the business and replenish the stock, if intended merely as a means of enforcing the security, and with a view of winding up the business, does not necessarily make the deed fraudulent, and is only *prima facie* fraud, the good faith of the transaction to be passed upon by the jury.⁴ Nor

¹ Godchaux v. Mulford, 26 Cal. 316.

² Margenthau v. Harris, 12 Cal. 245; Abercrombie v. Bradford, 16 Ala. 565; Neally v. Ambrose, 21 Pick. (Mass.) 185; Stevens v. Bell, 6 Mass. 342; Halsey v. Whitney, 4 Mas. C. C. 222; Leith v. Hollester, 4 Comst. (N. Y.) 214.

³ Camp v. Thompson, 25 Minn. 175.

⁴ Marks v. Hill, 15 Gratt. (Va.) 400; Woodward v. Marshall, 22 Pick. (Mass.) 468; Dunham v. Waterman, 3 Duer (N. Y.) 166.

will the deed be fraudulent if it provides that the grantor may conduct the business under the supervision of the trustee, who may at any time sell the trust property.¹

§ 583. **The Mortgagee May Complete the Manufacture of the Unfinished Goods.**—Where the mortgagee undertakes to complete the manufacture of unfinished goods and prepare them for sale, such condition is not inconsistent with his rights and duties as mortgagee, and consequently such action does not render the transfer void.²

§ 584. **Mortgagor Using the Mortgaged Property as His Own.**—A chattel mortgage given to secure a debt, and also to cover other property which is used by the mortgagor as his own, and for his own benefit, is fraudulent against creditors, and the instrument is void.³

§ 585. **Preferences—Fraudulent Intent.**—In Indiana a debtor may, in good faith, prefer creditors by executing a mortgage to them; thus, a mortgage executed five days prior to a deed of assignment is valid, unless it is shown to have been fraudulently executed.⁴

In Wisconsin chattel mortgages and assignments of accounts, transferring the entire property of the insolvent debtor to certain creditors with the intent that one of such creditors for himself, and as agent and trustee for the others, shall take immediate possession and convert such property into money and divide the same *pro rata* among the favored creditors, are held to have been in effect a general assignment with preferences, and void as to the other creditors not included.⁵

In Michigan an honest mortgage is not affected by a prox-

¹ Marks v. Hill, 15 Gratt. (Va.) 400; Kendall v. N. E. Carpet Co., 13 Conn. 388; De Forest v. Bacon, 2 Conn. 633.

² Smith v. Beattie, 31 N. Y. 542.

³ In re Burrows, 7 Biss. C. C. 526. See, also, Potts v. Hart, 99 N. Y. 168; Smith v. Cooper, 27 Hun (N. Y.) 565; Southard v. Benner, 72 N. Y. 429; Brackett v. Harvey, 91 N. Y. 214; Delaware v. Ensign, 21 Barb. (N. Y.) 85; Homer v. Jones, 7 Daly (N. Y.) 375.

⁴ Stix v. Sadler, 109 Ind. 254.

⁵ Winner v. Hoyt, 66 Wis. 227; Willis v. Bremner, 60 Wis. 622; Vernon v. Upson, 60 Wis. 418. See, also, Gere v. Murray, 6 Minn. 305.

imity of an assignment made shortly after the execution of the mortgage.¹

§ 586. In Nebraska.—In this State a debtor has the right to secure a part of his creditors in preference to others by a conveyance or mortgage of property. The fact of such preference will not of itself render the conveyance or mortgage fraudulent as to other creditors.² Thus, a debtor executes a chattel mortgage to secure the payment of a *bona fide* pre-existing debt, and soon thereafter executes a general assignment of his property for the benefit of his creditors; then the assignment was abandoned by the assignee and all parties interested, and the mortgagee took possession of the property. This mortgage was upheld even though it was executed on the same day and near the same time at which the assignment was executed.³

§ 587. In Kansas the fact that, pending the contemplated assignment for the benefit of creditors, a mortgage was given in good faith by the debtor to one of his creditors to secure a pre-existing debt, which mortgage had long previously been promised by the debtor to such mortgagee, does not show that the deed of assignment subsequently executed was intended to hinder, delay and defraud creditors, nor does it render such assignment void.⁴

Two chattel mortgages *bona fide* executed by an insolvent debtor for the benefit of creditors were followed the next day by a general assignment for the benefit of creditors. This was decided not to be a single transaction, and that both the mortgages and assignment were valid.⁵

§ 588. In South Carolina there is a statute⁶ against preferences, and they cannot be made to a mortgagee. Thus, a

¹ Root v. Harl, 62 Mich. 420; Root v. Potter, 59 Mich. 566. See, also, Farwell v. Myers, 59 Mich. 179; Chipman v. Kellogg, 60 Mich. 439; Angell v. Packard, 61 Mich. 564.

² Grimes v. Farrington, 19 Nebr. 44.

³ Bierbower v. Polk, 17 Nebr. 268.

⁴ Dodd v. Hills, 21 Kans. 707.

⁵ Bailey v. Kansas Manuf. Co., 32 Kans. 73.

⁶ Statutes of 1882, § 2014.

debtor, while in New York, executed a mortgage on his stock of goods in South Carolina to his wife for money advanced by her; two days thereafter he executed two other mortgages to his former partner to secure demand notes which were substituted for other notes, a large part of which was then due. The parties then returned to South Carolina, and in a few days the mortgagor surrendered his goods to an agent of the mortgagees and left the State. This action was held to amount to a general assignment with preferences, and was therefore null and void.¹

Where an insolvent debtor transfers all his property to one creditor by chattel mortgage, and later by bill of sale and deed for the benefit of such creditor and another, to the exclusion of all others, it is no violation of the statute forbidding preferences.²

§ 589. In **Alabama**, under the Code,³ a mortgage of all one's personal property and crops to be grown during the year, being substantially all the debtor's property, to secure advances previously made, and other advances to be made, to enable the debtor to produce the crop, is a general assignment which will inure to the benefit of all the creditors equally as to such advances made and contracted for contemporaneously with its execution.⁴

§ 590. In **Missouri** the preferences forbidden by the statute⁵ are not given by a mortgagor who executes his mortgage before the assignment, and as a separate and independent transaction.⁶

But this provision of the statute does not avoid deeds of trust in the nature of mortgages, which are only securities for the payment of debts. An assignment is more than a security for the payment of debts; it is an absolute appro-

¹ *Meinhard v. Strickland*, 29 S. Car. 491.

² *Wilks v. Walker*, 22 S. Car. 108.

³ Code, § 1737.

⁴ *Collier v. Wood*, 85 Ala. 91.

⁵ Rev. Stat. § 1354.

⁶ *Sampson v. Shaw*, 19 Mo. App. 274.

priation of property to their payment. Hence, an assignment is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. So, a deed of trust is not within the statute concerning assignments, and cannot be avoided by a creditor not named in it, except for fraud.¹

While this rule is now established by the Supreme Court of Missouri, yet some of the federal courts do not accept it. It is held by these courts, as a deed of trust on personalty does not purport to be a security for a debt, leaving an equity of redemption in the grantors, and empowering the trustee to sell only if the debts specified shall not be paid at maturity, but conveys the property absolutely to the trustee, to be sold for the payment of the debts named and preferred in it, it is not a mortgage security, but an assignment for the benefit of creditors. So, it has been held by these federal courts, a debtor in Missouri may, though he be insolvent at the time, prefer one or more of his creditors by securing them; but he cannot do it by an instrument conveying the whole of his property to pay one or more creditors. Instruments of the latter class will be construed as falling within the assignment laws, and as for the benefit of all creditors, whether named in the assignment or not.²

Other judges of the federal courts within Missouri hold a deed of trust in the nature of a mortgage of all the personal property of the debtor, to be a voluntary assignment, within the meaning and effect of the Missouri statute.³

But this doctrine has not been held by other courts,⁴ and

¹ *Crow v. Beardsley*, 68 Mo. 435.

² *Martin v. Hausman*, 14 Fed. Rep. 160.

³ *Dahlman v. Jacobs*, 16 Fed. Rep. 614; *Kellog v. Richardson*, 19 Fed. Rep. 70; *Clapp v. Dittman*, 21 Fed. Rep. 15; *Perry v. Corby*, 21 Fed. Rep. 737; *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Freund v. Yaegerman*, 26 Fed. Rep. 812; 27 Fed. Rep. 248; *State v. Morse*, 27 Fed. Rep. 261; *Elgin Co. v. Meyer*, 30 Fed. Rep. 659; *Weil v. Polack*, 30 Fed. Rep. 813.

⁴ *National Bank v. Sprague*, 5 C. E. Green (N. J.) 13; *Farwell v. Howard*, 26 Iowa 381; *Doremus v. O'Harra*, 1 Ohio St. 45; *Atkinson v. Tomilson*, 1 Ohio St. 237; *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223.

is not consonant with the decisions of the Missouri State courts. In a late case it was held that "the assignment law of Missouri is not, in letter or spirit, a bankrupt or insolvent debtor's act. A debtor, whether solvent or insolvent, may, in good faith, sell, deliver in payment, mortgage or pledge the whole or any part of his property for the benefit of one or more of his creditors, to the exclusion of others, even though such transfer may have the effect of delaying them in the collection of their debts. Its terms in no way qualify the rule by which the character of this instrument is to be determined. Reading the instrument, then, as a whole, in the light of the conveyances under which it was executed, was it intended as a security or as an absolute unconditional conveyance, *in presenti*, to the grantee of all the grantor's interest in the property, both legal and equitable, to the exclusion of any equitable right of redemption?" It was accordingly adjudged that the assignment law was inapplicable to a deed of trust, conveying all the debtor's property, real and personal, except his homestead and household furniture and a horse and buggy, to a trustee in trust to secure the payment of part of his debts, for which he was liable, either as principal or surety, which appeared to the court, upon a view of all its provisions, as applied to the facts of the case, to be "not an absolute indefeasible assignment of all the grantor's title, both legal and equitable, in the property, in trust for his creditors, but a deed of trust to secure the payment of debts and other liabilities, in which the grantor has an interest in the property conveyed," for the protection of which "equity gives him a right of redemption, though no clause of defeasance was inserted in the deed."¹

So, according to the law of Missouri, there can be no doubt that a deed of trust, conveying the personal property of a party to secure the payment of his debts therein named, and reserving in the clearest terms a right of redemption to

¹ Hargadine v. Henderson, 97 Mo. 375.

the grantor, by providing that, if he shall pay these debts, the deed shall be void, as well as by authorizing the trustee to sell the property only in case of his failing to pay those debts or any part thereof for five days after they become payable, is, according to the settled course of decisions in the courts of Missouri, a mortgage only, and not an assignment under the statute.¹

§ 591. The Mortgagor May Secure More Creditors Than the Mortgagee.—A mortgage to a trustee to secure several creditors is not necessarily fraudulent; the good faith of the transaction is for the jury.²

The mortgagee may hold the mortgage for his own security and that of a third party. This is not an assignment within the act requiring assignments to include all the property of the debtor and to be without preferences.³

Neither is the mortgaging of chattels exempt from execution fraudulent as to creditors,⁴ because the law gives the debtor the right of giving, selling, assigning or mortgaging any or all of his goods and chattels. So, when the transaction involves an adequate consideration, the mortgage will be valid.⁵

§ 592. The Assignee Cannot Divest the Lien of a Chattel Mortgage.—Where an assignee takes property covered with a chattel mortgage he cannot dispose of the property so as to divest the lien; he takes it with the lien from the assignor. If he does sell, after having the property appraised, he must account to the mortgagee for the appraised value.⁶

§ 593. Preferences—General Rule.—A debtor has the right

¹ *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223. See Section 14.

² *Bagg v. Jerome*, 7 Mich. 145; *Chapman v. Hunt*, 14 N. J. Eq. 149.

³ *Morse v. Powers*, 17 N. H. 236.

⁴ *Patten v. Smith*, 4 Conn. 450; *Vaughn v. Thompson*, 17 Ill. 78; *Washburn v. Goodheart*, 88 Ill. 229; *Prout v. Vaughn*, 52 Vt. 451.

⁵ *Conway v. Wilson*, 44 N. J. Eq. 457.

⁶ *Arnett v. Trimmer*, 43 N. J. Eq. 488. See, also, *Wakeman v. Barrows*, 41 Mich. 363; *Flower v. Cornish*, 25 Minn. 473; *Mann v. Flower*, 25 Minn. 500; *Bennett v. Ellison*, 23 Minn. 242; *Winsor v. McLelland*, 2 Story C. C. 492; *Leland v. Ship Medora*, 2 Woodb. & M. C. C. 92; *Bentley v. Wells*, 61 Ill. 59; *Badger v. Batavia Paper Man. Co.*, 70 Ill. 302.

to prefer one creditor to others by giving mortgages or otherwise, unless such preferences contravene some provisions of the assignment or bankrupt laws. He can make these preferences by giving a mortgage on his chattels for a pre-existing or present indebtedness.¹ And the question of the construction and effect of a statute of a State, relating to assignments for the benefit of creditors, is a question upon which the decisions of the highest courts of the State, establishing a rule of property, are of controlling authority in the courts of the United States.²

The fact that similar statutes are allowed different effects in different States is immaterial. The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretation, so far as it is a rule for the United States Supreme Court, a different law in one State from what it is in the other.³ Thus, the decision in *White v. Cotzhausen*,⁴ construing a statute of Illinois in accordance with the decisions of the Supreme Court of that State as understood by the United States Supreme Court, has no bearing upon a case arising under the statute of Missouri.⁵

§ 594. Rights of Creditors as to an Unfiled Chattel Mortgage.

—The general creditors of a mortgagor of chattels have no

¹ *Estwick v. Caillaud*, 5 T. R. 420; *Small v. Oudley*, 2 P. Wms. 427; *Nunn v. Wilsmore*, 8 T. R. 521; *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612; *Nat. Bank v. Sprague*, 20 N. J. Eq. 13; *Frankhouser v. Ellett*, 22 Kans. 127; *Funk v. Staats*, 24 Ill. 633; *McConnell v. Scott*, 67 Ill. 274; *Prior v. White*, 12 Ill. 261; *Dance v. Seaman*, 11 Gratt. (Va.) 778; *McTaggart v. Rose*, 14 Ind. 230; *Cornish v. Dews*, 18 Ark. 172; *Phippen v. Durham*, 8 Gratt. (Va.) 457; *M'Cullough v. Sommerville*, 8 Leigh (Va.) 415.

² *Brashear v. West*, 7 Pet. (U. S.) 608; *Allen v. Massey*, 17 Wall. (U. S.) 351; *Lloyd v. Fulton*, 91 U. S. 479; *Sumner v. Hicks*, 2 Black (U. S.) 532; *Jaffray v. McGehee*, 107 U. S. 361; *Peters v. Bain*, 133 U. S. 670; *Randolph's Executor v. Quidnick Co.*, 135 U. S. 457.

³ *Christy v. Pridgeon*, 4 Wall. (U. S.) 196. See, also, *Detroit v. Osborne*, 135 U. S. 492.

⁴ 129 U. S. 329. The Illinois Supreme Court holds that the construction of law indicated in *White v. Cotzhausen*, 129 U. S. 329, is not the law of Illinois in the matter of what constitutes a voluntary assignment. *Farwell v. Nilsson*, 133 Ill. 45.

⁵ *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223.

right to assail the mortgage as invalid until they secure a lien thereon by a levy under judgment and execution, or in some way have acquired a legal or equitable interest therein. Thus, a party on July 8th, 1882, executed two chattel mortgages upon personal property, which were not filed until January 4th, 1883, on which day he made a general assignment. The assignee, on March 15th, 1884, applied for and obtained an order directing him to sell the property mortgaged, and to pay the debts secured thereby. Creditors who had recovered a judgment against the mortgagor on March 3d, 1883, had issued two executions thereon, one of which still remained in the hands of the sheriff, and had applied to have the order amended and to have the proceeds from the sale of the property applied toward the payment of their judgments, on the ground that the mortgages were, as to them, void, because not filed when given. Their petition was denied, because the mortgages, having been given in good faith, were valid and binding upon the mortgagor and the assignee; that the general assignment was made before the recovery of the judgments, and the title of the mortgaged property thereby vested in the assignee, and the assigned property was not subject to levy or sale under the executions issued under the judgments; that the petitioners, having no lien upon the mortgaged property, sustained no such relations to the property as would permit them to maintain an action to set aside the mortgages as void.¹

A party executed a chattel mortgage and subsequently made a general assignment for the benefit of creditors. The assignee, with the consent of the mortgagor, surrendered the property to the mortgagee, from whose possession it was forcibly taken by the sheriff, who had executions against the mortgagor, issued upon a judgment rendered after the property came into the assignee's hands. It was decided that the invalidity of the chattel mortgage did not justify the

¹Sullivan v. O'Neil, 40 Hun (N. Y.) 516; 106 N. Y. 635; Bostwick v. Menck, 40 N. Y. 387; Spring v. Short, 90 N. Y. 538; Southard v. Benner, 72 N. Y. 424; Geery v. Geery, 63 N. Y. 252.

taking, as in such case the title was in the assignee, and proof of possession in him was sufficient to sustain his action to recover the property.¹

§ 595. **Fraudulent Assignment—Question for the Jury.**—Whether a chattel mortgage is fraudulent, in connection with an assignment, is a question for the jury.

Thus, a plaintiff held under a chattel mortgage given to him on the 29th of May, 1866, but not filed till December 6th, 1866. The sheriff, as defendant, justified under attachments against the mortgagor obtained by creditors, as against whom the chattel mortgage was void for want of filing. Before the obtaining of the attachments, and after the filing of the mortgage, the mortgagor made a general assignment, giving the plaintiff a preference for the liability due him, after applying the proceeds of the property covered by the mortgage, and providing that nothing therein contained should affect their rights under the mortgage. After the assignment and before the levy under the attachment, the plaintiff took possession of the property. It was held that the issue was whether the assignment was fraudulent, and that this was a question of fact for the jury, and that, although the object may be to prefer a debt and secure its payment, through the instrumentality of a void mortgage, that act was not, *per se*, fraudulent, the debt not being fictitious.²

The inference would be, that if a mortgagor, by an honest assignment, disposed of the property before the creditor acquired a lien, such disposition would end the right of the creditor. Were it not for the assignment an attaching creditor could assert his right.³

§ 596. **Who May Assail.**—A judgment creditor who does not have judgment and execution until after a general assignment, cannot maintain an action to set aside a prior

¹ *Wheeler v. Lawson*, 103 N. Y. 40.

² *McCarthy v. Kelly*, 12 Week. Dig. 539.

³ *Siedenbach v. Riley*, 111 N. Y. 560.

mortgage as fraudulent as long as the assignment is not attacked, it being held that the assignment constituted a prior and better title, which is entitled to a preference.¹

However, it is held that a general creditor of a mortgagor of chattels has no right to assail a mortgage or other conveyance of property made by him, as invalid, until the creditor has secured a lien thereon by levy under a judgment and execution or by some other method acquired a legal or equitable lien.²

A mortgagor, by simple contract, is within the protection of the provisions of the statute of frauds, declaring every conveyance or transfer of chattels, not followed by actual and continued change of possession, to be presumptively fraudulent³ as against the creditors of the vendor or owner; but, until they have judgment, they have no lien or a right to a lien upon the specific property; they are not in a condition to assail his rights as to creditors.⁴

§ 597. **A Valid Assignment—Void Chattel Mortgage Cannot Be Attacked.**—Where there is a valid assignment, a judgment creditor is not in a position to maintain an action to set aside a chattel mortgage, given by the assignors for a valuable consideration, but which is void as against the creditor on account of non-filing.

Where the assignor prefers a valid debt secured by a chattel mortgage, but invalid as to a judgment creditor on account of non-filing, the creditor cannot have the assignment set aside on the ground that it interferes with his rights to take advantage of the non-filing, and therefore as being fraudulent as against him. The creditor cannot impeach the mortgage unless he can have the assignment set aside.

If the assignment is valid and becomes operative before any proceedings by the creditor, there is nothing left upon which the creditor can make a claim or in which he

¹Spring v. Short, 90 N. Y. 538.

²Sullivan v. Miller, 106 N. Y. 635.

³2 Rev. Stat. p. 136, §§ 5, 6.

⁴Southard v. Benner, 72 N. Y. 424.

can acquire an interest, or upon which he has any right to a lien.¹

§ 598. **Attaching Creditors.**—As against attaching creditors, mortgages are absolutely void, in New York, unless they, or a true copy, are filed in the proper office, or unless there is an immediate delivery of the property by the mortgagor to the mortgagee, followed by an actual and continued possession.²

§ 599. **Mortgage Given On the Same Day of Judgment Not a Badge of Fraud.**—Because a mortgage is given on the same day that a judgment is rendered against the mortgagor, is no badge of fraud, unless it is accompanied by circumstances calculated to cast suspicion upon the transaction.³

§ 600. **In Bankruptcy—Exchanging Security.**—Under the Bankrupt law, though not now in force, many decisions were made to interpret its provisions. A chattel mortgage taken within four months by the creditor in exchange for a prior valid bill of sale of the same property and recorded pursuant to the laws of the State where the transaction took place, before any rights of the assignee in bankruptcy accrued, cannot be impeached by the mortgagor's creditors as a fraudulent preference within the meaning of the act.⁴

So, a mortgage exchanged for another form of security on the same property, will be upheld because the security for which it was exchanged was valid, and made and delivered more than four months before proceedings in bankruptcy were commenced.⁵

§ 601. **Under the Bankrupt Law.**—Under the Bankrupt law, an objection that a chattel mortgage is not in the usual

¹ *Kitchen v. Lowry*, N. Y. Sup. Ct., July, 1889; 22 Chi. L. News 51.

² *Camp v. Camp*, 2 Hill (N. Y.) 628; *Yenni v. McNamee*, 45 N. Y. 614; *Porter v. Parmley*, 52 N. Y. 185; *Steele v. Benham*, 84 N. Y. 634.

³ *Thornton v. Davenport*, 1 Scam. (Ill.) 296. See, also, *Gage v. Chesebro*, 49 Wis. 486.

⁴ *Sawyer v. Turpin*, 91 U. S. 114.

⁵ *Stevens v. Blanchard*, 3 Cush. (Mass.) 169; *Winsor v. McLelland*, 2 Story C. C. 492; *Clark v. Iselin*, 21 Wall. (U. S.) 360; *Cook v. Tullis*, 18 Wall. (U. S.) 340; *Watson v. Taylor*, 21 Wall. (U. S.) 378; *Burnishel v. Firman*, 11 Bank. Reg. 505; *Catlin v. Hoffman*, 9 Bank. Reg. 342.

and ordinary course of business, and is therefore fraudulent, is not applicable to such a mortgage made to secure an honest debt, wholly or partially incurred at the time of the mortgage's execution.¹

An assignee in bankruptcy may avoid a fraudulent mortgage given by his assignor. The assignee is entitled to the possession of the chattels attempted to be mortgaged, and may enforce his right by appropriate action. Such an action is not analogous to a creditor's bill, and it is no objection to it that the claims against the bankrupt are not in judgment.² The assignee in bankruptcy represents the whole body of the creditors, and it is his right and duty to contest the validity of any mortgage by which one creditor had obtained a preference over another.³

§ 602. **Assignees Could Bring Action in State Courts.**—State courts had jurisdiction of actions brought by assignees to set aside chattel mortgages for fraudulent preferences within the Bankrupt act. Such suits were not matters or proceedings within the meaning of that act. Such actions were brought upon causes of action created by that act or existing independently of it.⁴

ARTICLE VI.—RULE AS TO CONSUMABLE PROPERTY.

603. Consumption of Mortgaged Property.

604. Indiana Rule.

605. Because the Goods are Perishable Does Not Necessarily Avoid the Mortgage.

606. Part of the Property Being Perishable Does Not Avoid the Mortgage as to the Other.

607. Farm Chattels May be Mortgaged.

§ 603. **Consumption of Mortgaged Property.**—The mortgage of property, the use of which involves its consumption,

¹ *Moore v. Young*, 4 Biss. C. C. 128.

² *Robertson v. Todd*, 31 Conn. 555; *Mann v. Flower*, 25 Minn. 500.

³ *Southard v. Pickney*, 5 Abb. (N. Y.) N. Cas. 184; *In re Metzger*, 2 Bank. Reg. 355; *Wayne's Case*, 4 Bank. Reg. 23.

⁴ *Clafin v. Houseman*, 93 U. S. 130; *Ansley v. Patterson*, 77 N. Y. 156; *Wente v. Young*, 12 Hun (N. Y.) 220; *Mann v. Flower*, 25 Minn. 500. But see *Voorhies v. Frisbie*, 25 Mich. 476.

is an evidence of fraud, not, indeed, conclusive, but of much weight. Unless it be explained satisfactorily, it must cause the condemnation of the instrument, and it imposes the burden of establishing this explanation upon those claiming under the instrument; and when the right to use such perishable property is also reserved in the mortgage itself, it is fraudulent upon its face.¹

A trust deed was given to secure a *bona fide* debt, evidenced by four notes, payable in one, two, three and four years, and conveyed a tract of land, with the crops then upon it or thereafter grown upon the land, until said notes are fully paid; all stock of horses, mules, sheep and hogs, with the increase of the same, then on the said land and others placed on the same, and all farming implements used in the cultivation of the said land. It was held that the deed was not, *per se*, fraudulent on its face.²

No irresistible inference of intention to defraud is deducible from a provision in a deed of trust postponing the sale of the property conveyed for a reasonable length of time and reserving the use of the property to the grantor until sale, even though a portion of the property conveyed may be perishable in its nature and consumable in its use; nor is such inference a necessary deduction from the omission to annex a schedule or inventory of the property to the deed, nor is the inference a necessary one when all these circumstances exist in the same case.³

§ 604. **Indiana Rule.**—A chattel mortgage is not void because the mortgagee allows the mortgagor, her husband, to use a part of the mortgaged property, in support of their family. Thus, the mortgagee allowed the mortgagor, her husband, to slaughter “twenty-two fat hogs,” in support of their family. This did not “affect the mortgage in the slightest degree.”⁴

¹ *Farmers Bank v. Douglass*, 11 S. & M. (Miss.) 540; *Sommerville v. Horton*, 4 Yerg. (Tenn.) 550; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202.

² *Brockenbrough v. Brockenbrough*, 31 Gratt. (Va.) 580.

³ *Lewis v. Caperton*, 8 Gratt. (Va.) 148. See, also, *Cochran v. Paris*, 11 Gratt. (Va.) 348.

⁴ *Dice v. Irvin*, 110 Ind. 561.

§ 605. **Because Goods Are Perishable Does Not Necessarily Avoid the Mortgage.**—The fact that the property mortgaged is perishable in its nature and consumable in its use, does not necessarily avoid the mortgage. The character and condition of the property must be considered by the jury in determining whether the mortgage is fraudulent.¹ But if the possession of perishable goods is for so long a time that a necessary consumption must follow, it is therefore inconsistent with the avowed purpose of the mortgage to secure the debt made at the same time that the property was placed beyond the reach of other creditors.²

§ 606. **Part of the Property Being Perishable Does Not Avoid the Mortgage as to the Other.**—The postponing the sale of property conveyed for a reasonable length of time, does not avoid the mortgage, although a portion of the property conveyed may be perishable in its nature and consumable in its use.³

§ 607. **Farm Chattels May be Mortgaged.**—Some chattels are so transient in their nature that they cannot generally be mortgaged, such as in their use must be consumed.⁴ But it has generally been held that farm chattels are not of this class, such as farm stock, farm produce and farming implements.⁵

¹ *Miller v. Jones*, 15 Bank. Reg. 150; *Googins v. Gilmore*, 47 Me. 9; *Quarles v. Kerr*, 14 Gratt. (Va.) 48; *Brockenbrough v. Brockenbrough*, 31 Gratt. (Va.) 580. Compare *Darwin v. Handley*, 3 Yerg. (Tenn.) 502; *Richmond v. Curdup*, Meigs (Tenn.) 581; *Simpson v. Mitchell*, 8 Yerg. (Tenn.) 417.

² *Darwin v. Handley*, 3 Yerg. (Tenn.) 502; *Robbins v. Parker*, 3 Met. (Mass.) 117; *Richmond v. Curdup*, Meigs (Tenn.) 581.

³ *Lewis v. Caperton*, 8 Gratt. (Va.) 148; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Darwin v. Handley*, 3 Yerg. (Tenn.) 502; *Elmes v. Sutherland*, 7 Ala. 267; *Sommerville v. Horton*, 4 Yerg. (Tenn.) 541; *Green v. Wade*, 3 Humph. (Tenn.) 547.

⁴ *Sommerville v. Horton*, 4 Yerg. (Tenn.) 541.

⁵ *Ewing v. Cargill*, 22 Miss. 79; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Masson v. Anderson*, 3 Baxt. (Tenn.) 290; *Elmes v. Sutherland*, 7 Ala. 262; *Ross v. Young*, 5 Sneed (Tenn.) 627.

ARTICLE VII.—RETAINING POSSESSION AFTER DEFAULT.

- 608. Against Mortgagee's Consent.
- 609. General Rule.
- 610. Presumption of Payment.
- 611. May be Evidence of Fraud.
- 612. A Question for the Jury.
- 613. Illinois Rule.
- 614. Who May Attack.
- 615. What is a Reasonable Time.
- 616. Colorado Rule.
- 617. Montana Rule.
- 618. Third Persons May Attack.

§ 608. **Against Mortgagee's Consent.**—Retention of possession of the mortgaged property by the mortgagor beyond the time stipulated in the mortgage will not render the mortgage fraudulent and void as to creditors and purchasers, when such retention is without the consent, and in spite of the efforts of the mortgagee. Thus, the mortgagor removed the property before the debt became due; until the maturity of the debt the mortgagor had the right to retain possession of the property. The removal of the property was without the knowledge or consent of the mortgagee, who used proper diligence to recover it. Under this condition the rights of the mortgagee could not be defeated.¹

§ 609. **General Rule.**—In some of the States the mere failure to take possession of the mortgaged property after forfeiture by the mortgagor does not of itself invalidate the mortgage so that creditors can seize the goods for debts due from the mortgagor, nor will such neglect on the part of the mortgagee give title of the property to the purchaser. Thus, in Alabama the retention of possession by the mortgagor after the law day is not conclusive of fraud, but may be shown to be consistent with fair dealing.²

¹ *Simms v. McKee*, 25 Iowa 341.

² *Beall v. Williamson*, 14 Ala. 55; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Hudson v. Warner*, 2 Har. & G. (Md.) 415; *Merrill v. Dawson*, Hemp. C. C. 563; *Gist v. Pressley*, 2 Hill Ch. (S. Car.) 317; *Maples v. Maples*, Rice Ch. (S. Car.) 300; *Bank v. Gourdin*, Spears Eq. (S. Car.) 439; *Fishburne v. Kunhardt*, 2 Spears (S. Car.) 556; *Smith v. Henry*, 1 Hill (S. Car.) 16.

So, in Missouri, the mere extension of time by the mortgagee, or his neglect to enforce his lien under the chattel mortgage, will not destroy his rights, nothing more appearing; and there being no fraudulent connivance between the parties to the mortgage, and the rights of third parties not being interfered with.¹

But when the statute makes provisions for the time for which a chattel mortgage may be given, then the law must be followed. Thus, under the Kansas statute, a chattel mortgage duly executed and placed on file is notice to all the world for the period of one year, unless it is sooner satisfied. The judge says: "The statutes in this State do not, in express words, enact that a chattel mortgage shall in any case be valid, or shall in any case be notice to any person; but by the strongest implication, we think, they enact that every chattel mortgage, duly and honestly executed, deposited in the office of the register of deeds, shall be valid, and shall be notice as to all the world for the period of one year, unless the mortgage debt is sooner satisfied, and shall remain valid and notice as to all the world for each succeeding year, provided the mortgage remains unsatisfied, and provided a sufficient affidavit is filed prior to the expiration of each succeeding year." And the mortgage is a valid lien for one year, though the debt is due before the expiration of that period.²

But in Illinois the mortgage, if *bona fide*, is good and valid from the time it is filed for record, until the maturity of the entire debt or obligation, provided such time does not exceed two years.³ So, in this State the mortgagee must take possession of the property at the maturity of the debt, whether it extends two years or not.

§ 610. *Presumption of Payment.*—In those States where the mortgagee is not required to take immediate possession

¹ Feurt v. Rowell, 62 Mo. 524.

² Brown v. Campbell Co. (Kans.), 24 Pac. Rep. 492.

³ Rev. Stat. ch. 95, § 4.

of the property after default, if he delays to institute a suit for an unreasonable time, or fails to possess himself of the mortgaged property, the inference will be, in a controversy between him and a stranger, that the debt has been paid; but this is a mere presumption, and may be repelled or overcome by evidence.¹

§ 611. **May be Evidence of Fraud.**—So, in those States where the mortgagee is not compelled to take immediate possession after default, the continuance of the mortgagor in possession after the title has become absolute in the mortgagee, is not, *per se*, fraud, but, at most, only evidence of fraud.²

So, a failure of the mortgagee of chattels to take possession of them after default, as stipulated in the mortgage, does not vitiate a deed which, in its inception, was valid and effectual.³

§ 612. **A Question for the Jury.**—The retention of the possession of mortgaged property by the mortgagor, after the law day has passed, in these States, is not *prima facie* evidence of fraud nor the circumstances to which the law attaches a presumption of payment, nor is a purchaser authorized to infer payment of the mortgage debt from the retention of possession by the mortgagor after the law day has passed, unless under such circumstances as would satisfy a jury that payment had been made.⁴

§ 613. **Illinois Rule.**—In Illinois the mortgagee must take possession within a reasonable time after default.⁵ Suffering property to remain with the mortgagor after default is a fraud *per se*.⁶

¹ *Planters and Merchants Bank v. Willis*, 5 Ala. 770; *Dubose v. Dubose*, 7 Ala. 235; *Holbrook v. Baker*, 5 Green. (Me.) 309; *Beall v. Williamson*, 14 Ala. 55.

² *Shurtleff v. Willard*, 19 Pick. (Mass.) 202.

³ *Hudson v. Warner*, 2 Har. & G. (Md.) 415; *Argall v. Seymour*, 4 McCrary C. C. 55.

⁴ *Steele v. Adams*, 21 Ala. 534; *Magee v. Carpenter*, 4 Ala. 469.

⁵ *Cass v. Perkins*, 23 Ill. 382; *Cunningham v. Hamilton*, 25 Ill. 228; *Funk v. Staats*, 24 Ill. 633; *Reese v. Mitchell*, 41 Ill. 365.

⁶ *Reed v. Eames*, 19 Ill. 595; *Funk v. Staats*, 24 Ill. 633; *Hanford v.*

§ 614. **Who May Attack.**—In Illinois, a mortgagee in possession of chattels under his mortgage, for condition broken, has the right to retain the property as against the mortgagor and his creditors, whether his mortgage is valid or not, and until his right is challenged in some mode known to the law, and this cannot be done by an inquiry under and by virtue of a void execution against the mortgagor.¹

§ 615. **What Is a Reasonable Time.**—What is a reasonable time must be determined by the circumstances and the situation of the parties. Parties living within the same county can have one day in which to take possession of the mortgaged property.² Two or three days is an unreasonable delay.³

The absence of the mortgagee in another State at the time of default is no excuse for not taking possession.⁴ The mortgagee is not required to take possession until the expiration of the days of grace of the note given with the mortgage. If the last day of grace falls on Saturday the mortgagee need not take possession until the next Monday, and even the following Tuesday will answer.⁵

Where notes payable in New York were secured by a chattel mortgage on property in Chicago, it was held that the agent of the mortgagee in Chicago had until the next day after being advised of the non-payment of the notes, in due course of mail, to sue out a writ of replevin, provided the advice of default was sent by mail without delay on the part of the person sending, and that it was not necessary to resort to the telegraph in order to constitute diligence.⁶

§ 616. **In Colorado**, upon breach of condition, the title

Obrecht, 49 Ill. 146; Wylder v. Crane, 53 Ill. 490; Dunlap v. Epler, 88 Ill. 82; Summer v. McKee, 89 Ill. 127.

¹ Cummins v. Holmes, 109 Ill. 15.

² Reed v. Eames, 19 Ill. 594.

³ Cass v. Perkins, 23 Ill. 382; Wooley v. Fry, 30 Ill. 158; Reese v. Mitchell, 41 Ill. 365.

⁴ Wooley v. Fry, 30 Ill. 158; Reed v. Eames, 19 Ill. 594.

⁵ Arnold v. Stock, 81 Ill. 407.

⁶ Barbour v. White, 37 Ill. 164.

becomes absolute in the mortgagee, and to protect his rights as against creditors, subsequent purchasers and mortgagees, he must take possession and treat the property as his own.¹ After default the rights of interested parties are to be defined and determined by the principles which are applicable to the relations between vendors and creditors upon the sale of personal property. To permit the mortgaged property to remain in the hands of the mortgagor, after default, is a fraud *per se*.²

§ 617. **Montana Rule.**—Montana has a rule similar to those of Illinois and Colorado. The mortgagee must take possession of the mortgaged property after forfeiture by the mortgagor, within a reasonable time. Taking possession within a month after maturity is an unreasonable delay as to the rights of third persons.³

A purchaser from the mortgagor, who has retained possession two months after default, though with notice that the payment of the obligation had not been made, acquires a title which cannot be divested by the mortgage lien.⁴

§ 618. **Third Persons May Attack.**—In Illinois, if the mortgagee does not take possession within a reasonable time after default by the mortgagor, the mortgage becomes void only as to third persons. But this does not apply to the widow, heir or administrator of the mortgagor, for these representatives are concluded by the lawful acts of the mortgagor.⁵

¹ Chapin v. Whitsett, 3 Colo. 315. See, also, Wilson v. Voight, 9 Colo. 614; Brasher v. Christophe, 10 Colo. 284.

² Atchison v. Graham (Colo.), 23 Pac. Rep. 876.

³ Travis v. McCormick, 1 Mont. 148.

⁴ Travis v. McCormick, 1 Mont. 148. See S. C., 1 Mont. 347.

⁵ Summer v. McKee, 89 Ill. 127; Griffin v. Wertz, 2 Ill. App. 487.

CHAPTER XIII.

SALE AND REPLENISHMENT OF THE STOCK.

ARTICLE I.—DOCTRINE OF THE UNITED STATES COURTS.

619. United States Supreme Court—Inconsistent with the Idea of Security.

620. In Michigan—Fraud Generally a Question for the Jury.

621. Doctrine of the United States Circuit Courts.

622. Doctrine of the United States District Courts.

§ 619. **United States Supreme Court—Inconsistent with the Idea of Security.**—It is generally held by the courts that when the mortgage provides that the mortgagor may retain possession of the property and dispose of it for his own benefit, in the usual course of trade, it is fraudulent. But when he sells the mortgaged property and applies it to the payment of the debt, it is held by many courts as a valid transaction, though other courts hold that to be a fraudulent transaction. The decisions are not uniform on this latter doctrine, and therefore the doctrines of the courts are given by States; a discussion of this doctrine could add nothing to the rules which have already been established, some by statutory provisions; such a discussion would be a nullity.

The United States Supreme Court holds that an instrument which provides for the retention of the possession of the mortgaged property by the mortgagor, providing that he may dispose of it for his own benefit, in the usual course of trade, is inconsistent with the idea of security, or the nature and character of a mortgage; that such a stipulation furnishes a pretty effectual shield to a dishonest debtor, and consequently is void as to creditors. Justice Davis said: "In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it

is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time."¹

§ 620. In Michigan—Sale and Substitution—Fraud Generally a Question for the Jury.—In Michigan, under the statute, when a chattel mortgage is attacked as fraudulent against subsequent creditors or mortgagees in good faith, by reason of the mortgagor being permitted to remain in possession and to prosecute his business in the ordinary way, it is the province of the jury to determine whether such fraud is proved; but when the evidence is overwhelming and leaves no room for doubt as to the fact, the court may give the jury a peremptory instruction covering the issue. The good faith of such transactions, where they are not void upon their face, is, under the Michigan law, a question of fact for the determination of the jury.²

§ 621. Doctrine of the United States Circuit Courts.—The doctrine of these courts is generally in accord with that of the State in which the case may arise. Thus, in Oregon, it is held that such mortgage is in effect an assignment of such property in trust for the person making it, and is void as against both existing and subsequent creditors of the mortgagor.³ And in Texas it is held by the United States Circuit Court that such a mortgage is not made invalid by the mere fact that the mortgagee permits the mortgagor to sell and dispose of the mortgaged chattels as his own, this being a matter affecting the mortgagee only, who is not bound to apply the proceeds of the incumbered property to the secured debt.⁴

In New Jersey a case arose upon a mortgage of the ordi-

¹Robinson v. Elliott, 22 Wall. (U. S.) 513. See, also, Bank v. Hunt, 11 Wall. (U. S.) 391.

²People's Saving Bank v. Bates, 120 U. S. 556.

³Catlin v. Currier, 1 Saw. C. C. 7.

⁴Barron v. Morris, 14 Bank. Reg. 371.

nary goods and chattels connected with a brewery, including lager beer then manufactured, and such property as the mortgagor might afterwards acquire and place in the brewery. This was declared to be fraudulent.¹

§ 622. **United States District Courts.**—In Nevada it is held that, independently of the statute, a mortgage of a stock of goods, accompanied with a verbal understanding that the mortgagor should remain in possession, and continue to sell and traffic with the goods as his own, so long as suited the mortgagee, is fraudulent and void as to creditors.²

In Massachusetts Judge Lowell said: "I had supposed it to be well settled, after much debate and conflict of opinion—certainly but substantially settled—that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was fraud or not was one of fact for the jury, excepting under a peculiar clause of the Bankrupt law of England. It is so pronounced by Mr. May, in his valuable treatise on Voluntary and Fraudulent Conveyances,³ and by the cases he cites; and by the learned editors, both English and American, of Smith's Leading Cases;⁴ * * * and I understand the true law, both here and in England, to have been, until lately, that a conveyance for a valuable present consideration is never a fraud in law on the face of the deed, and if fraud is alleged to exist it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgagor. It is very strange that after our legislatures have met the difficulties of Twyne's Case by requiring registration, which gives not only constructive, but in most cases actual notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited and others following them should have

¹ *Miller v. Jones*, 15 Bank. Reg. 150.

² *In re Morrill*, 2 Saw. C. C. 356.

³ Page 126.

⁴ Notes to Twyne's Case, Vol. 1, p. 1.

reverted to the harsher doctrine which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud."¹

Many of the United States courts hold with the United States Supreme Court,² while others hold a contrary doctrine.³

ARTICLE II.—ENGLISH AND OTHER AUTHORITY.

623. English Doctrine.

624. Other Authority.

§ 623. **English Doctrine.**—The English courts' decisions are in accord with that of the United States Supreme Court, in those cases where the possession is retained by the mortgagor, accompanied with the power to dispose of the property for his own benefit in the usual course of trade, that the instrument is void as to the creditors of the mortgagor.⁴

§ 624. **Other Authority.**—Mr. Pierce says a mortgage or conveyance of this kind, when the mortgagor is allowed to retain possession and use the property as his own, by sale, presents a false appearance, and is only a pretense as a mortgage, and is calculated to deceive, and cannot fail to deceive

¹ *Brett v. Carter*, 2 Low. D. C. 458.

² *In re Kahley*, 2 Biss. 383; *In re Manly*, 2 Bond 261; *Smith v. Ely*, 10 Bank. Reg. 553; *In re Bloom*, 17 Bank. Reg. 42; *In re Ulrich*, 6 Ben. 483; *McLean v. Lafayette Bank*, 3 McLean 185; *In re Kirkbride*, 5 Dill. 116.

³ *Barron v. Morris*, 14 Bank. Reg. 371; *Hawkins v. Hastings Bank*, 1 Dill. 462; *Johnson v. Patterson*, 2 Woods 443; *Hills v. Stockwell*, 23 Fed. Rep. 432.

In the District of Columbia, a deed of trust given upon a stock of goods, which stipulates that the grantor may use and dispose of the goods at his own discretion, is void as to his creditors; but when the trustee is empowered to take immediate possession if the grantor is found removing them, it is valid. *Smith v. Kenny*, 1 Mackey 12; *Fox v. Davidson*, 1 Mackey 102.

And personal chattels on the premises, sold in the ordinary course of trade, without knowledge of the lien, are not subject to its operation, or, in other words, the lien in respect to such sales, where the goods are removed from the premises, is divested, and the purchaser takes perfect title. *Beall v. White*, 94 U. S. 382.

⁴ *James v. Whitbread*, 5 Eng. Law & Eq. 431; *Worseley v. De Mattos*, 1 Burr. 467; *Edwards v. Harben*, 2 T. R. 587; *Paget v. Perchard*, 1 Esp. 205; *Ex parte Games*, 12 Ch. D. 314. Compare *Hunter v. Corbett*, 7 Upp. Can. Q. B. 75.

if it be operative, and furnishes unusual facilities for fraud, reserves benefits to the grantor and prejudices other creditors. "When it thus appears that the transaction is, in its results, so fraudulent and so injurious to creditors that few transactions could be more so, even where an intent to defraud exists, so as to bring them within the statute of 13 Eliz., the courts are as ready to adjudge the transaction fraudulent as they would be if a fraudulent intent appeared."¹

ARTICLE III.—THE DOCTRINE OF THE STATE COURTS.

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| 625. General Statement. | 645. Missouri. |
| 626. Decisions—Alabama. | 646. Montana. |
| 627. Arkansas. | 647. Nebraska. |
| 628. Colorado. | 648. Nevada. |
| 629. Connecticut. | 649. New Hampshire. |
| 630. Dakota. | 650. New Jersey. |
| 631. Delaware. | 651. New York. |
| 632. Florida. | 652. North Carolina. |
| 633. Georgia. | 653. Ohio. |
| 633a. Idaho. | 654. Oregon. |
| 634. Illinois. | 655. Pennsylvania. |
| 635. Indiana. | 656. Rhode Island. |
| 636. Iowa. | 657. South Carolina. |
| 637. Kansas. | 658. Tennessee. |
| 638. Kentucky. | 659. Texas. |
| 639. Maine. | 660. Vermont. |
| 640. Maryland. | 661. Virginia. |
| 641. Massachusetts. | 662. Washington. |
| 642. Michigan. | 663. West Virginia. |
| 643. Minnesota. | 664. Wisconsin. |
| 644. Mississippi. | |

§ 625. **General Statement.**—The State courts are not in accord upon this question. Some hold that the possession and disposal of the mortgaged property according to the stipulation in the mortgage make the instrument fraudulent *per se*; others hold that it is only *prima facie* fraudulent and may be explained by evidence that it is *bona fide*. The doctrines of the different State courts are given separately, as it is impracticable to reconcile them.

¹ Pierce on Fraud. Mort. of Mdse. § 122. See article by Mr. Bump, 4 Cent. L. J. 219; also 5 South. L. Review 617, article by Mr. Jones; also article by Mr. Jones, 7 South. L. Review (N. S.) 95; reviewed by Ed. J. Maxwell, 7 South. L. Review (N. S.) 205.

§ 626. **Decisions—Alabama.**—Where the mortgagor is permitted to remain in possession and to sell the goods in due course of trade, for his own benefit, accompanied with possession, thus conferring on the mortgagor a dominion over the property which is utterly inconsistent with and subversive of the mortgage loan, rendering the mortgage itself virtually a conveyance, “made in trust for the use of the person making it,” stamps it with invalidity for fraud, as tending inevitably to hinder and delay the creditors of the mortgagor.¹ But a mortgage of a stock of merchandise, authorizing the mortgagor to continue and sell the goods, which expressly stipulates that such sale shall be exclusively for the benefit of the mortgagee, is valid as against the mortgagor’s creditors in the absence of evidence of actual fraud.² The sale must be for the mortgagee’s benefit and so stipulated. In a mortgage of a stock of goods given as security for a debt for money loaned to carry on the business, a stipulation that the mortgagee may take possession on default is an implied reservation of the possession in the mortgagor until default, and power to sell in the meantime is a necessary inference; the reservation of these benefits to the mortgagor stamps the mortgage as fraudulent in law against creditors, notwithstanding a parol agreement that the proceeds of the sale shall be paid to the mortgagee.³

§ 627. **Arkansas.**—A conveyance by a debtor or mortgagor, which stipulates that the grantor may use the proceeds of the sale of the goods and buy others, imposes upon him the duty of keeping up the stock, and clearly shows that the ownership of the property was not to be vested in the mortgagee, and the instrument is void as to creditors. Upon an issue as to whether the conveyance was fraudulent as to creditors, the circumstances and relationship of the parties to the business, the terms of the conveyance,

¹ *Benedict v. Renfro*, 75 Ala. 121.

² *Murray v. McNealy*, 86 Ala. 234; *Constantine v. Twelves*, 29 Ala. 607; *Price v. Mazange*, 31 Ala. 701; *Wiley v. Knight*, 27 Ala. 336 *Tickner v. Wiswall*, 9 Ala. 305.

³ *Owens v. Hobbie*, 82 Ala. 466.

whether absolute or conditional, and the subsequent possession of the property may be considered in arriving at the intention of the parties.

Fraud must not be presumed, but it must be proven, not certainly by positive evidence in all cases, but may be from facts and circumstances, such as when considered separate may lead to no satisfactory conclusion, but when taken together often become strong, satisfactory evidence.¹

§ 628. **Colorado.**—A reservation to the mortgagor of chattels of the right to sell the mortgaged property renders such mortgage void *ab initio* as to creditors and incumbrancers. Thus, where a mortgage covered a stock of clothing, and by its terms the mortgagor was permitted to remain in possession, use and enjoyment of the property, the mortgagor continuing in possession of the goods and carrying on the business in the ordinary course of trade, manufacturing the goods mortgaged, and selling the same 'as before the mortgage, up to the time that the mortgagee took possession, and this was well known to the mortgagee, made the mortgage fraudulent and void as to creditors.²

So, also, an agreement that the mortgagor may sell invalidates the mortgage as to creditors and incumbrancers; and this effect takes place at the moment of the delivery of the instrument.

It is not necessary to this effect that any of the property be sold under the power. The transaction is vitiated *ab initio* as to all of the property upon which it is attempted to create a lien by the reservation of such right, and not by the exercise of it. The provision that the chattels may be sold for a designated purpose only, does not help the mortgagee, when, if the purpose is executed, he is bereft of security. Whatever the motive of the parties to such transaction may be, viewed as a fraudulent question in the business of every-day life, its effects are injurious, and in law and equity such

¹ Sparks v. Mack, 31 Ark. 666; Gauss v. Doyle, 46 Ark. 122; Fink v. Ehrman, 44 Ark. 310.

² Bank v. Goodrich, 3 Colo. 141.

an agreement is fraudulent *per se*, as against creditors and incumbrancers.¹

In such case possession taken by the mortgagee under the mortgage does not protect the property against attachments by another creditor. The fact that the mortgage includes other property besides merchandise does not change the result. The instrument being void in part is void altogether. A mortgage permitting the mortgagor to continue to sell the goods, but requiring him to apply the proceeds in discharge of the debt secured, may not be void. The validity of such mortgage, the transaction being *bona fide*, is upheld by many well-considered decisions. In such case the value of the security suffers no diminution except as the debt secured is itself diminished. But when a mortgagor is permitted to sell the goods in the regular course of trade and retain the proceeds to his own use, the mortgage is void as to creditors.²

§ 629. **Connecticut.**—Where the possession is merely colorably changed, the parties themselves knowing and admitting that its tendency is to keep off creditors, it can hardly be otherwise than that such was its principal object, and therefore fraudulent in fact. When there is no real change of possession of the property mortgaged, and no evidence in the case that authorized the jury to find any such change of possession, the property can be seized by attachment by other creditors. Thus, an entire neglect to take possession renders a sale or mortgage constructively fraudulent, and in some cases undoubtedly is conclusive evidence of a fraudulent trust, when there is none such in fact.³

§ 630. **Dakota.**—Under the Dakota Civil Code,⁴ respecting fraudulent conveyances, which excepts from its operation chattel mortgages, a chattel mortgage duly executed and filed is not even *prima facie* fraudulent as against creditors,

¹ *Brasher v. Christophe*, 10 Colo. 284.

² *Wilson v. Voight*, 9 Colo. 614.

³ *Bishop v. Warner*, 19 Conn. 460.

⁴ Section 2024.

though it provides that the mortgagor may retain possession of the goods; the burden is upon him who asserts that it is fraudulent. The law never presumes fraud. Thus, when a mortgage is given on goods, and the possession remaining in the mortgagor, it is not *prima facie* fraudulent if it be properly executed and duly filed. Such execution and recording were equivalent to actual delivery and continued possession of the property mortgaged, although the mortgage, in terms, provides for retention of the property by the mortgagor, and possession is retained by him. Such a transaction is not fraudulent *per se*, nor *prima facie* evidence of fraud.¹

The execution of a chattel mortgage upon a secret parol trust between the parties thereto, without any change in the possession of the mortgaged property, is, in law, fraudulent and void as against creditors of the mortgagor. Any secret reservation in trust for the grantor, not apparent on the face of the papers, but resting wholly in parol, renders the entire transaction void as against creditors injured thereby.²

A lease, which is in effect a chattel mortgage, containing the clause, "except such goods as are sold in the usual course of retail trade," is an implied permission to the mortgagor to make such sales; and there being nothing in the lease or chattel mortgage indicating any appropriation or intent to appropriate the proceeds of sales to any other purpose, it is a permission to the mortgagor to sell such goods, being a part of the mortgaged property, for his own benefit, and is at least presumptively fraudulent as to creditors of the mortgagors. Judge Kellam rendered this decision. Presiding Judge Corson said that it should be held conclusively fraudulent.³

§ 631. Delaware.—The statute requires, in case of a transfer of personal property, that the delivery of the goods shall be as soon after the sale as it conveniently can be, while the

¹ Reichert v. Simons, 42 N. W. Rep. 657.

² National Bank v. Comfort, 28 N. W. Rep. 855.

³ Greeley v. Winsor (S. Dak.), 45 N. W. Rep. 325.

common-law rule on this subject is, that if goods are in the possession of the bailee at the time of the sale, notice of the sale must not only be given to the bailee but must be accepted and assented to by him in order to transfer the possession or delivery of the goods from the vendor to the purchaser.¹

§ 632. **Florida.**—A mortgage of a stock of goods by the owner thereof, under which the mortgagor is permitted by the mortgagee to sell the goods at his discretion, or in the usual course of business, is fraudulent and void as to the creditors of the mortgagors.

Chief Justice McWhorter says where the mortgagor has, by the terms of his mortgage, every right and power to dispose of the merchandise included in the mortgage, the mortgage is void as to the mortgagor's creditors.²

§ 633. **Georgia.**—A mortgage of a stock of goods cannot, by subsequent purchases and additions of new goods to such stock, be made to cover an amount greater in value than the original stock mortgaged.³

So, a mortgage upon a stock of goods then on hand and upon the additional purchases as they should be made, is a good lien on the amount of the goods on hand at the time, and is good upon future purchases to that extent, even if those purchases be unpaid for, except as against any legal lien or title that may be against the goods in the hands of a third person.⁴

§ 633a. **Idaho.**—A chattel mortgage providing that the mortgagor shall continue in possession, doing a retail business, is invalid as against the mortgagor's creditors, in the absence of a provision that the proceeds shall be applied on the mortgage debt. Judge Sweet says that in the absence of a statute on the subject he is in accord with the current of authority holding that possession of a stock of merchan-

¹ *Taylor v. Richardson*, 4 *Houst.* 300; *Laws of 1874*, ch. 62, § 4.

² *Logan v. Logan*, 22 *Fla.* 561.

³ *Chisholm v. Chittenden*, 45 *Ga.* 213.

⁴ *Goodrich v. Williams*, 50 *Ga.* 425; *Anderson v. Howard*, 49 *Ga.* 313.

dise by the mortgagor, with power to sell and retail the same, without requiring that the profits shall be applied to the payment of the debt due to the mortgagee, is absolutely void as to the attaching creditors of the mortgagors. This doctrine, he says, closes one of the most dangerous avenues to fraudulent practices, and what follows—injurious effects upon the business character of the State and the honest efforts of *bona fide* business men.¹

§ 634. Illinois.—Under a mortgage upon a stock of goods in trade and fixtures, the mortgagor sells the goods in course of trade and replenishes them with others, with the consent of the mortgagee. This invalidates the mortgage as to the stock in trade as against creditors, although, as to the fixtures not embraced in such permission to sell, the mortgage might remain a valid lien.²

When a mortgagor goes ahead and sells nearly all the goods in trade on hand and replenishes the stock with other goods, and which is done with the consent of the mortgagee, it will render the mortgage fraudulent as to creditors, so far as it covers the goods so permitted to be sold.³

If, by any agreement, expressed or implied, the mortgagor is permitted to retain possession and continue the sale of the goods so mortgaged, the mortgage is invalid as against his judgment creditors; when such arrangement is not contained in the mortgage, it may be found so by the jury from the attending circumstances.⁴

After taking possession, the mortgagee or his agent may permit the mortgagor to remain in the store under his old sign, and sell the goods for the benefit of the mortgagee; such action does not destroy the good faith of the transaction.⁵

A mortgage given by a manufacturer upon his stock stipu-

¹ *Lewiston Nat. Bank v. Martin*, 23 Pac. Rep. 920. See *Lyon v. Bank*, 29 Fed. Rep. 566.

² *Schemerhorn v. Mitchell*, 15 Ill. App. 418.

³ *Greenbaum v. Wheeler*, 90 Ill. 296; *Barnett v. Fergus*, 51 Ill. 352; *Ogden v. Stewart*, 29 Ill. 122.

⁴ *Simmons v. Jenkins*, 76 Ill. 479.

⁵ *Read v. Wilson*, 22 Ill. 377.

lating that he might continue to manufacture the articles, sell the same, receive the price, and take out a certain sum each month to enable him to carry on the business and support his family, is fraudulent and void as to creditors. Such provisions are inconsistent with the nature of the security, and prohibited by the policy of the law.¹

The mortgagor, in such a case, cannot become the agent of the mortgagee to sell the goods before the mortgagee takes possession.²

The degree of weight to be given to this circumstance would, of course, greatly depend upon the other evidence in each case. Taken by itself, and with no other circumstances to throw discredit upon the mortgage, it would merely show that the mortgagee had consented to release the goods from the lien of his mortgage, thereby impairing his own security to that extent, but would by no means justify the inference that he intended to abandon his lien upon the other property.³

Property taken in exchange for mortgaged property cannot be substituted in the place of the mortgaged property.⁴ And a mortgage is void on its face when the mortgagee allows the mortgagor to retain possession of the goods and sell them in the usual course of trade.⁵

§ 635. **Indiana.**—A provision in a chattel mortgage that the mortgagor may remain in possession of the goods mortgaged, and continue his business of selling the stock at retail, does not, *per se*, and as a matter of law, render the mortgage fraudulent and invalid, although there is no provision expressly requiring the proceeds to be applied to the liquidation of the mortgage debt. Thus, the following stipulation does not render the mortgage void—that the

¹ Greenbaum v. Wheeler, 90 Ill. 296.

² Dunning v. Mead, 90 Ill. 376.

³ Barnett v. Fergus, 51 Ill. 352.

⁴ Rhines v. Phelps, 3 Gilm. 455.

⁵ Brandt v. Daniels, 45 Ill. 453; Huschle v. Morris, 131 Ill. 587; Davis v. Ramson, 18 Ill. 396; Barnett v. Fergus, 51 Ill. 352; Brown v. Riley, 22 Ill. 46; Read v. Wilson, 22 Ill. 377; Hathorn v. Lewis, 22 Ill. 395; Ogden v. Stewart, 29 Ill. 122.

mortgagor should retain possession of the stock of goods and operate the business, keeping the stock replenished from time to time, so as to keep the quantity and variety substantially intact, with the view and purpose to aid the payment and discharge of the notes secured. The after-acquired stock was considered to come under the mortgage, and the stipulation did not render the mortgage invalid on its face; nor does the right of the mortgagor to continue in possession, with the power to continue the business and dispose of the stock at retail, make the mortgage fraudulent *per se*.

Under the statute¹ a fraudulent intention cannot be judicially inferred from the fact that the mortgagor, by the terms of the mortgage, may remain in possession with leave to sell the property, even though he be not, by stipulation in the mortgage, required to account for the proceeds of such sales. Whether a mortgage is or is not actually fraudulent is a question of fact, to be determined according to the circumstances of each particular case.²

A chattel mortgage is not void on its face because it is not required that the mortgagor shall account for the proceeds of the sales made by him of the mortgaged property. It is a question of fact for the court or jury whether it be fraudulent.³

§ 636. Iowa.—The fact that the mortgagor of chattels retains possession of the property, and reserves the right to sell the same in the ordinary course of trade, and to apply the proceeds to his own use, does not render the mortgage fraudulent at law.⁴

As the mortgagee has the right to take possession at any time, and sell the same for the satisfaction of the debt, this

¹ Rev. Stat. of 1881, § 4924.

² *McFadden v. Fritz*, 90 Ind. 590; *Dessar v. Field*, 99 Ind. 548; *Fisher v. Syfers*, 109 Ind. 514. The case of *Mobley v. Letts* has been overruled. 61 Ind. 11.

³ *McFadden v. Fritz*, 90 Ind. 590; *McFadden v. Hopkins*, 81 Ind. 459; *Morris v. Stern*, 80 Ind. 227; *Lockwood v. Harding*, 79 Ind. 129; *McLaughlin v. Ward*, 77 Ind. 383; *Muncie Bank v. Brown*, 112 Ind. 474; *Rindskoff v. Vaughan*, 40 Fed. Rep. 394.

⁴ *Meyers v. Evans*, 66 Iowa 179.

fact that the mortgagor retains possession of the mortgaged property and reservation to sell the same in the ordinary course of trade and apply the proceeds to his own use, does not render the mortgage fraudulent in law.¹

Whether a chattel mortgage, when the mortgagor holds possession and deals with the property as his own, is fraudulent or not is a question of fact for the jury, not one of law for the court.² His holding possession and disposing of the goods affords, at most, only a *prima facie* badge of fraud, which may be rebutted.³

§ 637. **Kansas.**—Where a chattel mortgage is given upon a stock of goods, and by agreement outside of the mortgage the mortgagor is to remain in possession of the goods until the maturity of the note secured by the mortgage, and is permitted to continue in his business and dispose of the goods in the ordinary way, and apply the proceeds of his sales toward the payment of the note secured, and the transaction is entered into by all the parties in good faith, the mortgage is not void, although the mortgagor fails to account to the mortgagee for the proceeds of his sales, as he ought to have done.⁴

A chattel mortgage, where the mortgagor is permitted to have the entire possession of the property with power to sell the same, and to dispose of the proceeds thereto as he may choose, is generally void as against creditors of the mortgagor; and it should certainly be held to be void where nearly all other facts go to show that the mortgage was executed for the purpose to hinder, delay and defraud the mortgagor's creditors.⁵

¹ *Hughes v. Cory*, 20 Iowa 399; *Clark v. Hyman*, 55 Iowa 14; *Sperry v. Etheridge*, 63 Iowa 543; *Jaffray v. Greenbaum*, 64 Iowa 492.

² *Torbert v. Hayden*, 11 Iowa 435.

³ *Fromme v. Jones*, 13 Iowa 474; *Smith v. McLean*, 24 Iowa 322; *Wilhelmi v. Leonard*, 13 Iowa 330; *Adler v. Claflin*, 17 Iowa 89; *Kuhn v. Graves*, 9 Iowa 303; *Clark v. Hyman*, 55 Iowa 14; *Campbell v. Leonard*, 9 Iowa 489; *Hughes v. Cory*, 20 Iowa 399; *Torbert v. Hayden*, 11 Iowa 435. See, also, *Bolton v. Lambert*, 72 Iowa 483.

⁴ *Howard v. Rohlfing*, 36 Kans. 357.

⁵ *Leser v. Glaser*, 32 Kans. 546.

When, neither by the terms of a chattel mortgage nor by a contemporaneous oral agreement between the mortgagor and the mortgagee of a stock of goods, a power of sale or of daily sales is given to the mortgagor, but the mortgagor, with the knowledge and acquiescence of the mortgagee, has the same control and disposition of the stock of goods that he exercised before the execution of the chattel mortgage, makes daily sales and applies the proceeds at his discretion, such a mortgage is, as a matter of law, fraudulent as to creditors of the mortgagor.¹

The mortgagor, if he keeps the possession, and sells under a contemporaneous oral agreement, may as well make the sale as a stranger. He acts in that respect as a *quasi* agent, at least, of the mortgagee, and, as such agent and salesman, is entitled to compensation for his services. Doubtless such arrangements are liable to abuse, and should always be closely scanned; but still they are not absolutely and in all cases to be adjudged void as a matter of law.²

In *Whitson v. Griffis*³ the rule is laid down with the current of other decisions in this State, that where a chattel mortgage is given on a stock of goods with the stipulation for possession thereof by the mortgagor, and by agreement outside the mortgage the mortgagor is permitted to continue the disposition of the goods in the ordinary course of his business, and to use a portion of the proceeds thereof in the support of his family, paying the remainder over in the discharge of the mortgage debt, the latter transaction, as a matter of law, is not rendered fraudulent and void as against creditors, but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not.

§ 638. **Kentucky.**—A clause of a mortgage relating to anything that might thereafter be added to the stock is valid between the parties, but the mortgagee thereby acquires no available right to such on the subsequently-acquired prop-

¹ *Standard Imp. Co. v. Schultz* (Kans.), 25 Pac. Rep. 625.

² *Frankhauser v. Ellett*, 22 Kans. 127.

³ 39 Kans. 211.

erty, as against the creditors of the mortgagor. The general rule is, that a mortgage which covers property to be acquired *in futuro* is void and cannot avail against the claims of other creditors.¹

Judge Hines says the effort to mortgage what the debtor may subsequently acquire is constructively fraudulent; such a conveyance is evidently good between the parties, and the lien attaches so soon as any stock is added, and being good between the parties, it is good as to antecedent creditors, at least until attacked for fraud.² That is, it being merely constructively fraudulent, is valid until a creditor asserts his claim and denies the validity of the mortgage as to property acquired after its execution. Judge Holt holds that, in such a case, the attacking creditors not only state a fact that the property is obtained subsequently to the giving of the mortgage, but that it is only embraced by it by a clause attempting to cover the property acquired *in futuro*. This of itself makes it constructively fraudulent as to other creditors, and when averred constitutes an attack upon it for fraud, and the portion of the opinion cited no doubt meant that such a clause in a mortgage is valid as to antecedent creditors if they remain silent.³

§ 639. **Maine.**—A clause in a chattel mortgage of a stock of goods to the effect that the mortgagor while remaining in possession may sell the stock at retail and appropriate the proceeds to the replenishing of the stock with new goods, which are to be subject to the mortgage, is so far valid between the parties to the mortgage as to vest in the mortgagee the title to the goods so purchased and put into the

¹ *Ross v. Wilson*, 7 Bush 29; *Vinson v. Hallowell*, 10 Bush 538, opinion by Peters, C. J.

² *Zaring v. Cox*, 78 Ky. 527.

³ *Loth v. Carty*, 85 Ky. 591. This case explains the language of *Zaring v. Cox*, 78 Ky. 527. The tendency of modern decisions in this, as well as in the courts of most of the other States, has been to leave the question of fraud open to investigation, to be determined by all the facts which tend to show the actual intention with which the conveyance is executed. *Enders v. Williams*, 1 Met. (Ky.) 846.

The doctrine of *per se* fraud is arbitrary and inconsistent with the harmony of legal science. *Daniel v. Morrison*, 6 Dana (Ky.) 182.

shop in pursuance thereto. A chattel mortgage giving a power to the mortgagor to sell at retail, accompanied with a duty to use the proceeds of the sale in buying other goods to supply the place of those sold, is valid.¹

But a mortgage of furniture then in a dwelling-house, and that afterwards purchased, conveys a valid title to that only of which the mortgagor was then the owner. A mortgage being void as to after-acquired property, the mere delivery of the same by the mortgagor to the mortgagee, the former retaining the possession, the delivery does not transfer a valid title as against attaching creditors. In such a case the mortgagee cannot hold the subsequently-purchased property as against creditors.²

§ 640. **Maryland.**—A clause in a chattel mortgage of goods in a store, providing for all renewals and substitutions for the same, the object being to include not only the articles then in stock but whatever may be at any time therein in course of the mortgagor's business, cannot convey subsequently-acquired goods so as to give the mortgagee a right of action at law against a party seizing them.³ That while it is well settled in this State that a party cannot convey subsequently-to-be-acquired goods, so as to give the mortgagee a legal title thereon or a legal right of action against a party seizing them, yet such conveyance creates in equity a valid lien upon the subsequently-acquired property.⁴

§ 641. **Massachusetts.**—A power to a mortgagor in a mortgage of a stock of goods, to sell the same in the regular course of trade, does not of itself avoid the mortgage *per se*, but is, at most, only evidence of a fraudulent purpose to be submitted to the jury.⁵

A provision in a mortgage of personal property, given in fraud of creditors, that the mortgagor may use and enjoy

¹ *Deering v. Cobb*, 74 Me. 332; *Allen v. Goodnow*, 71 Me. 420.

² *Griffith v. Douglass*, 73 Me. 532.

³ *Hamilton v. Rogers*, 8 Md. 301.

⁴ *Butler v. Rahm*, 46 Md. 541.

⁵ *Fletcher v. Powers*, 131 Mass. 333.

the mortgaged property, will not warrant the jury in finding that the assignee of the mortgage had notice of its fraudulent character.¹

A mortgage providing that the mortgagor shall remain in possession and sell until condition broken, is not necessarily fraudulent.² So, a mortgage given, providing that the mortgagor may remain in possession of the mortgaged property and use and enjoy the same is not, *per se*, void; the question of fraud should be submitted to the jury, and all facts surrounding the transaction are to be taken into account.³

If the mortgaged property is perishable and cannot be kept, or if it is to be consumed by the mortgagor, the transaction must be considered as collusive and fraudulent.⁴

Whenever the terms of the contract are, by possibility, compatible with good faith, and upon their face have essential elements of a legal contract, the question of fraudulent intent and want of good faith is to be submitted to the jury.⁵

A mortgage of a trader's stock in trade is not fraudulent *per se*, though it is provided therein that, until condition broken, he may retain in his possession and use all the mortgaged property without hindrance or interruption from the mortgagee; and though there is no agreement of the parties at the time the mortgage is executed, that the mortgagor may sell and dispose of the mortgaged property and apply the proceeds to his own use, he promising that if he should make larger sales thereof he would add to the mortgagee's security by other property. The presumption of fraud arising from such a mortgage and agreement may be repelled by satisfactory evidence.⁶

§ 642. **Michigan.**—A mortgage of a stock of goods with a stipulation that the mortgagor shall continue the sale of the

¹ *Sleeper v. Chapman*, 121 Mass. 404.

² *Jones v. Huggefurd*, 3 Met. 515.

³ *Briggs v. Parkman*, 2 Met. 258.

⁴ *Robbins v. Parker*, 3 Met. 117.

⁵ *Jones v. Huggefurd*, 3 Met. 515.

⁶ *Briggs v. Parkman*, 2 Met. 258.

goods, means that the sales shall be made in the ordinary course of business, and such a mortgage is valid.¹

A mortgage of a stock of goods, where the mortgagor is allowed to hold possession and to sell in the ordinary course of trade, and to keep his stock of like goods to a specific amount as security to the mortgagee, will cover goods subsequently purchased and added to the stock.²

A right sometimes reserved to the mortgagor of chattels to retain possession and dispose of them in the course of trade, is a conditional bailment which will be terminated by any change or enlargement of the reserved privilege without the mortgagee's consent, or by any diversion of the proceeds of sale from the designated object. The mortgagor has no right to use the proceeds for his own benefit, subject to a right in the mortgagee to take possession when he is afraid his security is in peril of diminution.³

When a chattel mortgage is attacked as fraudulent against subsequent creditors or mortgagors in good faith, by reason of the mortgagor's being permitted to remain in possession and to prosecute his business in the ordinary way, it is the province of the jury to determine whether such fraud is proved; but when the evidence is overwhelming, and leaves no room for doubt as to what the fact is, the court may give the jury a peremptory instruction covering the issue.⁴

A mortgage of a stock of goods, the mortgagor to hold possession and to sell in the usual course of business, is not fraudulent on its face as against the mortgagor's creditors.⁵

§ 643. **Minnesota.**—A mortgage of a stock of goods, left in the possession of the mortgagor, and which, by its terms, authorizes him to dispose of the mortgaged property as his own, without satisfaction of the mortgage debt, is fraudulent in law as against creditors of the mortgagors. But if

¹ *Wingler v. Sibley*, 35 Mich. 231.

² *Leland v. Collver*, 34 Mich. 418.

³ *Daggett v. McClintock*, 56 Mich. 51.

⁴ *People's Sav. Bank v. Bates*, 120 U. S. 556.

⁵ *Gay v. Bidwell*, 7 Mich. 519; *People v. Bristol*, 35 Mich. 28; *Fry v. Russell*, 35 Mich. 229; *Oliver v. Eaton*, 7 Mich. 108.

the mortgage requires the proceeds of the sales to be paid directly to the mortgagee in payment of such debt, it is not necessarily fraudulent.¹

It is well settled in this State that a mortgage of chattels, as a stock of goods in trade, left in the possession of the mortgagor, which, by its terms, authorizes him to dispose of the mortgaged property as his own, without satisfaction of the debt, is to be deemed fraudulent in law as against the creditors of the mortgagor. If the intent that the mortgagor may retain possession of the property and dispose of it as his own is apparent in the mortgage itself, the existence of such intent is to be determined by the court, otherwise the existence of the intent is a question for the jury. In every case, if the intention is found to exist, the law declares the mortgage fraudulent. A mortgage which is fraudulent as to any of the property covered by it is fraudulent altogether.²

If the mortgage is fraudulent it is not in the power of such mortgagee to remove the original taint of the mortgage by taking possession of the property under and by virtue of the mortgage.³

§ 644. **Mississippi.**—A deed of trust on a stock of goods which provides for the retention of possession by the grantor, with power of sale and replenishing the goods in the usual course of his business, is, upon its face, fraudulent and void as to his creditors; and such fact cannot be avoided by a stipulation in the deed for monthly accounting to be rendered to the trustee, and for payment to him of the money received, to be applied under his direction to the payment of the current expenses of the business and to make purchases to replenish the stock.⁴

It is a general rule that where a mortgage covers an entire stock of goods on hand, and all goods that may be

¹ *Bannon v. Bowler*, 34 Minn. 416,

² *Horton v. Williams*, 21 Minn. 187; *National Bank v. Anderson*, 24 Minn. 435; *Stein v. Munch*, 24 Minn. 390.

³ *Stein v. Munch*, 24 Minn. 390.

⁴ *Joseph v. Levi*, 58 Miss. 843.

bought and put into the store from the time of the execution of the mortgage till the debt secured shall become due, and the mortgagor is allowed to remain in possession of the goods, selling and making purchases to replenish his stock, in the usual course of business, it is fraudulent as to creditors affected thereby.¹

§ 645. **Missouri.**—A stipulation in a chattel mortgage that the mortgagor shall remain in possession with power to sell and apply the proceeds not for his own benefit, but to pay on the mortgage debt, does not render the mortgage fraudulent or void.² But a mortgage of chattels not *in esse*, or not owned by the mortgagor at the execution of the mortgage, will not pass a legal title to such after-acquired property, and the mortgagee, to render his lien effectual, must assert it in a court of equity.³

A trustee in a deed of trust of personalty, a stock of goods in trade, who takes possession before levy by an attaching creditor, is entitled to hold the property for the purpose of the trust, notwithstanding a previous agreement between the *cestui que trust* and the debtor that the debtor might sell the property in the usual course of trade, for his own benefit.⁴

Where a mortgagee of a stock of goods, in good faith, takes actual possession of the same prior to a levy of an attachment by another creditor of the mortgagor, for the purpose of securing a debt due him, and continues to hold the actual possession up to the time of the attachment levy, he will be protected and hold the property as against the attaching creditor, and it is immaterial that the mortgage

¹ *Harman v. Hoskins*, 56 Miss. 142.

The question whether there was a fraudulent intent in such case is a question for the jury. Such mortgage is voidable only by the creditors who obtain liens upon the property before the mortgagee in fact takes possession. *Summers v. Roos*, 42 Miss. 749.

The intention of the parties in making the instrument may be shown to be in good faith. The fact of the mortgagor's possession of the property, and use of it, with the consent of the mortgagee, is only evidence of fraudulent intent. *Ewing v. Cargill*, 13 S. & M. 79.

² *Hubbell v. Allen*, 90 Mo. 574.

³ *France v. Thomas*, 86 Mo. 80.

⁴ *Dobyns v. Meyer*, 95 Mo. 132.

contained a stipulation which rendered it void except as between the parties.¹

§ 646. *Montana*.—A mortgage of a stock of goods, providing that the mortgagor is to continue to sell the goods in the usual course of trade, accounting to the mortgagee as requested, when it appears that the mortgagor, by consent of the mortgagee, received a portion of the sale, is void; such provision is incompatible with the idea of security by a lien upon the goods. The only security that the mortgagee has is the personal integrity of the mortgagor in possession. Under the law of this State such a provision is fraudulent, and, whether a question of fact, and not of law, does not apply to a case like this, arising upon the face of the written instrument itself, in such a way as to require its submission to a jury.

Judge McLeary holds that a mortgage of a stock of goods in trade, in which the mortgagor is permitted by the mortgagee to sell the goods at his discretion, in the usual course of his business, is inherently and essentially fraudulent as to the creditors of the mortgagor. And this is so, even though the agreement or understanding between the mortgagor and the mortgagee permitting such sales is not shown upon the face of the mortgage, but is proven by extrinsic evidence.²

¹ *Petring v. Chrysler*, 90 Mo. 649. See *Knoop v. Nelson Dist. Co. (Mo.)*, 14 S. W. Rep. 822.

No matter what may be the character of the property or the business of the grantor, the very stipulations of the deed that the property shall be held to secure the debt, and that upon default in payment the mortgagee may take possession thereof and sell the same, are in effect stipulations that the grantor will not sell it; and unless there are other provisions in the deed expressly authorizing the grantor to sell, or from which it must necessarily be implied that he has a power to sell, the deed cannot be held void upon its face. *Weber v. Armstrong*, 70 Mo. 217, overruling *Lodge v. Samuels*, 50 Mo. 204.

When by the terms of the mortgage the mortgagor is not allowed to dispose of the goods for his own use, but is required to apply the proceeds to the discharge of the debt secured by the mortgage, the mortgage is not void as being for the use of the mortgagor. *Metzner v. Graham*, 57 Mo. 404.

An agreement to apply proceeds of sales to replenishing the stock does not vitiate the instrument. *Walter v. Wimer*, 24 Mo. 63. See *Voorhis v. Langsdorf*, 31 Mo. 451.

² *Leopold v. Silverman*, 7 Mont. 266.

§ 647. **Nebraska.**—A chattel mortgage of a stock of goods containing a clause by which the mortgagor is given possession with power to sell in the usual course of trade, the proceeds to go in satisfaction of the mortgage debt, although made by statute presumptively fraudulent, is not conclusively so, and may, by satisfactory evidence, be shown to have been made in good faith.¹ While the legal presumptions are against the good faith of such mortgages, they are not conclusively so, and it may be shown by competent evidence that the mortgage was in fact made in good faith and without fraudulent intent.²

But if no evidence of good faith is shown, the presumption of fraud becomes conclusive as to creditors and *bona fide* purchasers.³ And a mortgage which does not in terms or by necessary implication permit the mortgagor to sell the property, but merely provides that he may retain the use of the property, is not fraudulent in law. The question of fraudulent intent in making it is a question of fact for the jury to decide.⁴

A mortgagor was permitted to remain in possession of the mortgaged property and sell the same for two or three years, at the expiration of which time attachments were levied on the property, whereupon the mortgagee brought an action of replevin under his mortgage, and, the goods having been converted into money, recovered the full amount claimed. It appeared that a considerable part of the stock upon which the mortgage lien existed had been sold and replaced, to some extent, by other goods. Judge Maxwell, speaking for the court, held that in no event could the mortgagees recover anything but the stock, or its value, upon which they had a lien, and that the question of fraudulent intent was not involved in the case. He says: "This court, by a long series of decisions, has held that a mortgage of goods in this State

¹ Davis v. Scott, 22 Nebr. 154.

² Turner v. Killian, 12 Nebr. 580; Pyle v. Warren, 2 Nebr. 241; Comp. Stat. p. 288, § 12.

³ Brunswick v. McClay, 7 Nebr. 137; Pyle v. Warren, 2 Nebr. 241.

⁴ Williams v. Evans, 6 Nebr. 216; Hedman v. Anderson, 6 Nebr. 392.

is a specific lien, which attaches to the goods mortgaged and not to goods in general."¹

§ 648. **Nevada.**—No mortgage of personal property is valid against other creditors, when the mortgage is not recorded, unless possession of the mortgaged property be delivered to the mortgagee. If property mortgaged could be transferred to the mortgagee by a mere constructive delivery, when actual delivery can be readily made, then there would be no means by which the public could ascertain whether the personal property is mortgaged or not; there must be a change of possession, for the person in possession and exercising ownership over it is presumed to be the owner. If, after being mortgaged, it was allowed to remain in the possession of the mortgagor, mortgage after mortgage could readily be placed upon it; this being the very thing sought to be remedied by the statute. There must not only be a transfer of the right of property, but, when the mortgage is not recorded, the possession must accompany it.²

The failure to deliver and retaining possession of the mortgaged property is conclusive evidence of fraud in law. In such case courts of law will not stop to inquire whether there is actual fraud or not; the law will impute it, because the statute does not permit this conclusion of fraud to be overcome by evidence of the honesty of intent. It would be dangerous to do it, and the result would be an open infraction of the law plainly written.³

§ 649. **New Hampshire.**—Under an agreement by which a mortgagor is allowed by the mortgagee to sell the mortgaged chattels and apply the proceeds on the mortgage debt, his wrongful appropriation of money so received to his own use without the knowledge, consent or fraud of the mortgagee, will not make the mortgage void as against cred-

¹ *Wedgwood v. Citizens Bank*, 45 N. W. Rep. 289; and see *Tallon v. Ellison*, 3 Nebr. 63; *Williams v. Evans*, 6 Nebr. 216; *Hedman v. Anderson*, 6 Nebr. 392; *Gregory v. Whedon*, 8 Nebr. 373.

² *Doak v. Brubaker*, 1 Nev. 218; *Gray v. Sullivan*, 10 Nev. 416.

³ *Lawrence v. Burnham*, 4 Nev. 361; *Wilson v. Hill*, 17 Nev. 401.

itors of the mortgagor.¹ But where, on a mortgage of a stock of goods, it was agreed that the mortgagor should continue in possession of the goods, and sell them as before for his own benefit, and he did so, it was held that such an arrangement was inconsistent with the avowed object of the mortgage, rendering it fraudulent and void as to the mortgagor's creditors.²

The permission to sell raises a presumption, *prima facie*, of a secret trust, and the secret trust being shown the fraudulent intent is conclusively presumed. The intention may be explained in the case of retention of property by the vendor after sale; so may the sale of goods by the mortgagor. The explanation need not be expressed in the written consent provided by the statute. There is no secret trust when it appears from all the evidence that the permitted sale is honestly made for the purpose of extinguishing the mortgage debt, and not, except incidentally, for the benefit of the mortgagor. Such a sale and such an application of the proceeds have no tendency to hinder, delay or defraud the unpreferred creditors.³

§ 650. **New Jersey.**—A mortgage of a stock of goods, with permission to the mortgagor to remain in possession and sell and dispose of the stock without restriction, in the ordinary course of trade, is only evidence of fraud to go to the jury to say whether it was given for fraudulent purposes.⁴

Where there is a mortgage of goods to be thereafter acquired by the mortgagor, an execution levied upon the goods after they are so acquired will, in a court of law, prevail over the mortgage.⁵

§ 651. **New York.**—A chattel mortgage is fraudulent and void as to creditors, where it is given with the tacit understanding and arrangement that the mortgagor may sell and

¹ *Gibbs v. Parsons*, 64 N. H. 66.

² *Putnam v. Osgood*, 51 N. H. 192.

³ *Wilson v. Sullivan*, 58 N. H. 260.

⁴ *Miller v. Shreve*, 29 N. J. L. 250; *In re Bloom*, 17 Bank. Reg. 425.

⁵ *Looker v. Peckwell*, 38 N. J. L. 253.

dispose of the mortgaged property and apply the avails to his own use. Such an agreement may be inferred from the fact that the mortgagor does, with the knowledge and assent of the mortgagee, so sell and dispose of the property.¹ So, where a provision in the mortgage stipulates that the mortgagor shall remain and continue in the quiet and peaceable possession of the goods and chattels, and have the full and free enjoyment of the same until default was made in the payment, the following facts were shown: There was evidence to the effect that the mortgagee was a brother of the mortgagor; the business consisted of the sale of the mortgaged goods, and if they could not be sold, the mortgagor could not well continue the business. The mortgagor did continue business in the usual way. It was decided that the jury had the right to infer from these facts that it was naturally understood between the parties that the mortgagor should have the right to sell and dispose of the merchandise embraced in the mortgage, for and on his own account, and that the mortgage was consequently void as against creditors.² If the stipulation is contained in the mortgage that the mortgagor may continue in possession and sell and dispose of the goods for his own benefit, the mortgage is void as to the mortgagor's creditors.³ When such agreement is not contained in the mortgage, the question of its existence and of the badge of fraud arising from it and the conduct of the parties, is one for the jury.⁴

A chattel mortgage is not rendered void as to creditors of the mortgagor by a provision authorizing him to sell the mortgaged property and apply the proceeds of the same toward the payment of the mortgage debt. Nor does the

¹ *Potts v. Hart*, 99 N. Y. 168; *Southard v. Benner*, 72 N. Y. 424; *Griswold v. Sheldon*, 4 N. Y. 581; *Wood v. Lowry*, 17 Wend. 492; *Chatham Nat. Bank v. O'Brien*, 6 Hun (N. Y.) 231; *Gardner v. McEwen*, 19 N. Y. 123; *Russell v. Winne*, 37 N. Y. 591.

² *Hangen v. Hachenmeister*, 114 N. Y. 566.

³ *Edgell v. Hart*, 13 Barb. (N. Y.) 380; 9 N. Y. 213; *Delaware v. Ensign*, 21 Barb. (N. Y.) 85; *Ford v. Williams*, 13 N. Y. 577; *Southard v. Benner*, 72 N. Y. 424.

⁴ *Gardner v. McEwen*, 19 N. Y. 123; *Southard v. Pickney*, 5 Abb. N. C. 184.

authority to the mortgagor to sell on credit, taking good business paper which the mortgagee agrees to accept and apply on the debt, affect the validity of the mortgage.

The permission to use a portion of the proceeds of sale to purchase other property does not vitiate the mortgage, when it is coupled with a condition that the property so purchased shall be brought in and be subject to the mortgage lien, but an agreement, although outside of the mortgage and oral simply, that the mortgagor may use a portion of the proceeds of sales for his own benefit, avoids the mortgage. Such an agreement, however, must be proved. A mere expectation of one of the parties is not sufficient; it must appear that it had the conscious, concurrent assent of both.¹

A chattel mortgage is not, *per se*, void because of the provision in it allowing the mortgagor to sell the mortgaged property, but accounting to the mortgagee for the proceeds and applying the avails to the mortgage debt.²

Where the mortgagor, who was a manufacturer, was to remain in possession, and continue the manufacture and sell, either for cash or on credit, in his discretion, the cash and the accounts to be transferred to the mortgagee and applied on the debt, the mortgage is fraudulent and void as to creditors, because such an agreement enables the mortgagor to sell his entire stock on credit and keep his other creditors at bay.³

§ 652. **North Carolina.**—A mortgage of a stock of goods, which contains a provision that the mortgagor is to remain in possession for at least nine months, and a further stipulation that, in case of removal or attempt to remove the same from the town and an unreasonable depreciation in value, or for any other cause, the security should become inadequate,

¹ Brackett v. Harvey, 91 N. Y. 214.

² Ford v. Williams, 24 N. Y. 359; Conkling v. Shelley, 28 N. Y. 360; Miller v. Lockwood, 32 N. Y. 293; Frost v. Warren, 42 N. Y. 204; Caring v. Richmond, 22 Hun (N. Y.) 369; Dolson v. Saxton, 11 Hun (N. Y.) 565.

³ City Bank v. Westbury, 16 Hun (N. Y.) 458.

the mortgagee may take possession, affords the most cogent extrinsic evidence of fraud.¹

The presumption of fraud, arising upon a deed of trust executed by an insolvent person to secure one of his creditors, conveying a store, lot and stock of goods and the increase of such stock, and containing a provision that the trustor shall have the privilege of continuing his business, is not rebutted by proof that the debt secured by the trust deed is a *bona fide* debt, and that the insolvency of the trustor was known to the trustee and *cestui que trust* at the time of the execution of the deed. In such case, the presumption of fraud arises from the fact of the debtor's insolvency, and the further fact that the trustee and *cestui que trust* are parties to the deed of trust which secures the benefits to the maker and which conflicts with the rights of the creditors.²

A mortgage given on a stock of goods, the goods to remain in the possession of the mortgagor, who was to sell them and apply the proceeds on the debt in a reasonable time, nothing showing that the mortgage was executed in bad faith, or to secure antecedent debts, and within a few months the mortgagor made a payment on the debt, it was decided sufficient evidence to rebut any presumption of fraud because the mortgagor had possession of, and sold the goods, and any violation of his agreement, as buying other goods and intermingling them with those mortgaged, does not affect the mortgagee.³

§ 653. **Ohio.**—A stipulation in a mortgage that the mortgagor shall retain possession and sell the goods in the usual course of retail trade, paying over the money received therefor to the mortgagee, as the goods are sold, does not render the mortgage, *per se*, fraudulent and void as against other creditors of the mortgagor. The question of good faith upon

¹ Cheatham v. Hawkins, 80 N. Car. 161.

² Holmes v. Marshall, 78 N. Car. 262.

³ Kreth v. Rogers, 101 N. Car. 263.

such stipulation is one of fact for the determination of the jury.¹

But a mortgage of personal property where the mortgagor retains possession by virtue of the mortgage, with power of sale, is void as against subsequent purchasers and execution creditors. But when possession is taken by the mortgagee, the mortgage becomes valid so as to protect the mortgaged property from execution creditors not having made a levy, and against subsequent purchasers from the mortgagor.²

§ 654. *Oregon*.—When it appears on the face of a chattel mortgage, or by parol evidence, that the mortgagee of personal property has given to the mortgagor unlimited power to dispose of the property mortgaged for the use of the mortgagor, the mortgage is void as to purchasers and attaching creditors. In such case there is no lien as against innocent purchasers, and where there is no lien there is no mortgage.³

Upon the execution of a chattel mortgage on a portion of a stock of goods in a store, by a retail merchant, it was verbally agreed between the parties that the mort-

¹ *Kleine v. Katzenberger*, 20 Ohio St. 110. See, also, *Kilbourne v. Fay*, 29 Ohio St. 264.

² *Brown v. Webb*, 20 Ohio 389; *Collins v. Myers*, 16 Ohio 547; *Freeman v. Rawson*, 5 Ohio St. 1; *Harman v. Abbey*, 7 Ohio St. 218.

In *Kleine v. Katzenberger*, 20 Ohio St. 110, the court distinguishes *Harman v. Abbey*, 7 Ohio St. 218, and *Collins v. Myers*, 16 Ohio 547, by saying: " * * * The mortgagor was permitted in each case to sell on his own account and to replenish the stock, with the agreement that the mortgage lien should attach to and cover all subsequent additions to the stock. This was held to be inconsistent with the idea of certain security upon specific property. In the case of *Harman v. Abbey*, the mortgagor was allowed, by the terms of the mortgage, to continue selling the goods at retail, and the only restriction upon his power to dispose of the proceeds at his pleasure was that he was not to withdraw any portion thereof from the business beyond the amount of necessary expenses. * * * When it is said, therefore, in those cases that the mortgage of personal property, with possession and a power of disposition reserved to the mortgagor, is fraudulent and void as against his other creditors, we are to understand this as referring to the power of disposition for the mortgagor's own benefit. It is only where the power of sale is such as to leave in the mortgagor a dominion over the property, inconsistent with the alleged lien of the mortgage, that the latter has been held *per se* fraudulent and void." In none of these cases was it necessary to go further. This is the extent of the authorities cited in their support.

³ *Orton v. Orton*, 7 Oreg. 478.

gaged goods which remained in the mortgagor's possession should form part of his stock in trade, and that he should have full power to sell and dispose of the same in the usual course of his business, and the mortgagor did retain possession and sell goods in accordance with such agreement; held, that the mortgage was fraudulent and void as to the other creditors of the mortgagor, and created no lien on the goods.¹

§ 655. **Pennsylvania.**—In this State the rule prevails that one man shall not have a lien on personal property owned by and in possession of another, as against creditors and innocent purchasers.²

The security by mortgage of personal property to a mortgagee or pawnee depends on the right of the mortgagor or pawnor, on the delivery of the chattel mortgaged or pledged.

Delivery is necessary. Every chattel mortgage, when the parties stand in the relation of creditor and debtor, unaccompanied with such possession as the subject-matter is capable of, is fraudulent and void as to all other creditors.³

§ 656. **Rhode Island.**—The question whether a mortgage which allows a mortgagor to retain possession of the mortgaged personalty, or to sell and replace the same, is or is not fraudulent as against his creditors, should be determined by a jury, from the circumstances attending the execution of the mortgage.⁴

If the mortgagee takes possession under the mortgage of the after-acquired property, the title vests in him, both at law and in equity.⁵ A mortgage of a trader's stock of goods, together with all additions to the same or renewals of it that might afterwards be made, is in itself ineffectual to vest in the mortgagee a legal title to the after-acquired property.⁶

§ 657. **South Carolina.**—Where the language clearly shows

¹ *Jacobs v. Ervin*, 9 Oreg. 52; *Aiken v. Pascall*, 24 Pac. Rep. 1039.

² *Eumer v. Van Giesen*, 6 Week. N. Cas. 363.

³ *Clow v. Woods*, 5 S. & R. 279. See, also, *Hower v. Geesaman*, 17 S. & R. 251; *McKibbin v. Martin*, 64 Pa. St. 352.

⁴ *Williams v. Winsor*, 12 R. I. 9.

⁵ *Cook v. Corthell*, 11 R. I. 482.

⁶ *Williams v. Briggs*, 11 R. I. 476.

the intention to give a lien, not only upon the property embraced in the description of the mortgage, then in possession of the mortgagor, but also upon all he may produce or prepare for market or otherwise acquire, the mortgage will cover not only the property which might be the product mentioned in the mortgage, but also any that the mortgagor might produce or otherwise acquire; and the property subsequently bought by the mortgagor, subsequent to the execution of the mortgage, according to the principles of equity, the mortgagee was entitled to an equitable lien thereof as soon as it was acquired by the mortgagor, although he could not be said to have a legal right thereto until it was delivered to or taken possession of by the mortgagee under the mortgage. Thus, when a mortgage has been executed, and an antecedent creditor subsequently obtains judgment against the mortgagor and liens upon property before it is delivered to the mortgagee, the mortgagee is entitled to recover its possession from the officer making the levy. A mortgagee failing to show a legal right to the possession of the property in dispute may yet succeed in showing an equitable right to such possession, and can therefore have his protection based upon the equitable and not upon the legal right.¹

A chattel mortgage is not, as a matter of law, fraudulent and void because it covers such goods, wares and merchandise as may from time to time thereafter be acquired in lieu and place thereof, in the current business of the said mercantile establishment.²

§ 658. **Tennessee.**—Where a trustee is not required to take possession of the goods mentioned in the trust deed, without limiting the debtor in his discretion as to the appropriation of the proceeds of sales, no distinction made as to goods to be bought for replenishing the stock, whether for cash or on credit, but the entire stock is to be held under trust conveyances, the same is void. If the amount mentioned in the deed is to stand as security for future advances to enable the

¹ *Parker v. Jacobs*, 14 S. Car. 112.

² *Hirshkind v. Israel*, 18 S. Car. 157.

debtor to trade upon the goods in his possession, and such others as he may bring into the stock, the conclusion is irresistible that the conveyance was made to hinder and delay creditors, and is therefore fraudulent in fact and absolutely void.¹

The object of a mortgage is to obtain security beyond a mere reliance upon the honesty of the debtor, and to avoid the risk of other creditors taking all his property by fastening a specific lien upon that covered by the deed. Where the mortgagor retains possession of the stock and replenishes it, there is no specific lien, but a floating one, which attaches, swells and contracts as the stock in trade changes, increases and diminishes, or wholly expires by the entire sale and disposition, at the will of the mortgagor. Such a mortgage is void.²

§ 659. **Texas.**—A chattel mortgage by which it is contemplated that the goods shall be exposed for sale at retail by the mortgagor in the ordinary way is void as to creditors. Thus if, at the time of the execution of a mortgage, there was a secret agreement that the mortgagor should remain in possession of the goods and sell them, and he did so remain in possession, with the consent of the mortgagee, and they were exposed to sale, it was held that the instrument, taken in connection with the contemporaneous verbal agreement and conduct of the parties in accordance therewith, was clearly void as to the creditors of the mortgagor.³

So, a mortgage, taken in connection with a verbal agreement attending which, that the mortgagor remain in possession of the goods and control of the mercantile business as before, is wholly void and passes no title to the mortgagee.⁴

¹ *McCrasly v. Hasslock*, 4 Baxt. 1.

² *National Bank v. Ebbert*, 9 Heisk. 153, overruling *Hickman v. Perrin*, 6 Coldw. 135.

Such a mortgage is fraudulent *per se*, because such a transaction, irrespective of fraud, is against public policy, throwing open wide the door for possible fraud, and the contract does not fall within the province of equity. *Phelps v. Murray*, 2 Tenn. Ch. 746.

³ *National Bank v. Lovenberg*, 63 Tex. 506.

⁴ *Duncan v. Taylor*, 63 Tex. 645.

Where it is stipulated in the mortgage that the mortgagor shall be permitted to remain in quiet and peaceable possession of the goods until he makes default in any of the terms of the mortgage, but in the event that the stock should be threatened by any process of law from any third party, then the mortgagee shall be at liberty to take possession of the said stock and dispose of the same according to his discretion, and pay himself from the proceeds of such sale, it was decided that such mortgage was void as to creditors.¹

A mortgage upon a stock of goods, with the power in the mortgagor to retain possession and sell in the usual course of trade, and to apply the proceeds to replenish the stock, is fraudulent in law as to creditors. There is a well-defined distinction between a mortgage with power simply to retain possession and one with power to retain possession and sell the property and replenish the stock.²

§ 660. **Vermont.**—The Vermont statute³ requires, for the validity of chattel mortgages, a change in the possession of the goods to the mortgagee, or that the mortgage shall be recorded and be given to secure a specific debt, to which the parties shall make oath, and that the mortgagor shall not have power to sell except by written consent of the mortgagee, indorsed on the mortgage or on its record.

A mortgage on a stock of goods, which is left in the possession of the mortgagor, who covenants to keep the value of the stock up to the amount of the debt secured, containing a provision against sale of the goods without written consent of the holder, is not rendered invalid, *per se*, as against the mortgagor's creditors, by the mortgagee's subsequent consent to the sale of the goods in the usual course of business by the mortgagor.

The provision that after-acquired goods placed in the stock by the mortgagor shall be covered by the mortgage is valid, and on taking possession of the goods under the mort-

¹ Wilber v. Kray, 73 Tex. 533.

² Peiser v. Peticolas, 50 Tex. 638.

³ Rev. Stat. §§ 1966, 1972.

gage, with the consent of the mortgagor, such after-acquired goods pass to the mortgagee as against the mortgagor's assignee in insolvency, appointed shortly thereafter, when it does not appear that the mortgagee knew of the mortgagor's insolvency at the time of taking possession of the goods.

Such a mortgage of goods is not, *per se*, fraudulent. Because such mortgages furnish an opportunity to defraud the other creditors is no reason why a court should adjudge them *prima facie*, much less conclusively, fraudulent, until it is established that the oath thereto is false, and that such mortgage was made by the parties to hinder and delay their other creditors in collecting their debts against the mortgagor.¹

§ 661. *Virginia*.—The provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent. Such is the case where a grantor reserves a power over the property conveyed incompatible with the known purpose of the trust and adequate to the defeat thereof.²

It is also well settled in this State that no irresistible inference of intent to defraud is deducible from a provision in a deed of trust postponing the sale of the property conveyed a reasonable length of time, and reserving the use of the property to the mortgagor or grantor until sold, even although a portion of the property conveyed may be perishable in its nature and consumable in its use; nor is such inference a necessary deduction from the omission to annex a schedule or inventory of the property to the deed, nor is the inference a necessary one where all these circumstances exist in the same case.³

Judge Daniel says that a provision in a deed that the grantor shall attend to the business but shall be under the

¹ Peabody v. Landon, 61 Vt. 318.

² Lang v. Lee, 3 Rand. 410; Sheppards v. Turpin, 3 Gratt. 373; Spence v. Bagwell, 6 Gratt. 444; Brockenbrough v. Brockenbrough, 31 Gratt. 580; Addington v. Etheridge, 12 Gratt. 486; Quarles v. Kerr, 14 Gratt. 48; Perry v. National Bank, 27 Gratt. 755.

³ Lewis v. Caperton, 8 Gratt. 148; Cochran v. Paris, 11 Gratt. 348; Sipe v. Earman, 26 Gratt. 563.

control of the trustee, who may, at any time, on his own motion, and the general request of creditors, sell the property at auction, is not fraudulent *per se*, so as to avoid the deed.¹

§ 662. **Washington.**—Where a mortgage provides that the mortgagor shall retain possession and carry on the business, and keep up the stock of goods, the proceeds to be used for the sole use and benefit of the mortgagee, either by applying the money so obtained in payment of the mortgage debt, or in keeping up the security, or adding to the stock, it was decided that the mortgage was void for indefiniteness and as being a fraud on creditors of the mortgagor.²

Such an arrangement may be prolonged indefinitely, and would be from the first and all the time palpable injustice to the other creditors; for it would enable the mortgagor, so long as the mortgagee should not press the payment of the mortgage debt, to sell the goods as his own, and within a certain range to appropriate the proceeds to his own purposes for an indefinite length of time, and is void as to creditors.³

But a mortgage of a stock which allows the property to be retained by the mortgagor, and sold by him at retail for the sole purpose of applying the proceeds to the payment of the mortgage debt, is valid as against the creditors of the mortgagor.⁴

§ 663. **West Virginia.**—A trust deed was made to secure a certain debt, and stipulated that the grantor obligated himself to keep always on hand a stock of goods equal in quantity, description and value to the personal property hereinabove mentioned, until the debt which the deed was drawn to secure was paid in full. The court, by Judge Moore, held that the inferences were fairly deducible from the stipulation that the grantor should retain possession of the goods, and

¹ Marks v. Hill, 15 Gratt. 400.

² Byrd v. Forbes, 3 Wash. St. 318.

³ Wineburgh v. Schaer, 2 Wash. St. 328.

⁴ Langert v. Brown, 3 Wash. St. 102.

has an absolute power of sale thereof. This stipulation is inconsistent with the security for the debt or object of the trust and adequate to defeat thereto, being equivalent to a power of revocation; and the deed is therefore fraudulent and void as to creditors.¹

§ 664. **Wisconsin.**—A chattel mortgage is fraudulent as to creditors when there is an agreement between the creditors secured thereby and the mortgagor, that the mortgagor may use and dispose of the goods mortgaged in the regular course of trade, and will be ground for an attachment, by any creditor, of the goods mortgaged.²

While it is the settled law of this State that an agreement in or contemporaneous with a chattel mortgage, that the mortgagor may remain in possession, sell the goods and apply the proceeds on the debt, may be valid, yet, if he applies even a part of the proceeds to his own use, it renders the instrument void as against creditors.³ Yet the mere fact of leaving a stock of goods in the mortgagor's possession with instructions to go on and sell as usual and make remittances to the mortgagee, though proper evidence to go to the jury in connection with other facts upon the question of fraudulent intention, does not of itself amount to fraud.⁴

An oral agreement between the mortgagor and the mortgagee, that the mortgagor was to remain in possession of the goods and sell the same in the regular course of trade, as if no mortgage had been executed, and apply the proceeds to his own use, in the support of his own family and otherwise, renders the mortgage fraudulent and void in law as to the creditors, the same as if the agreement had been made a part of the mortgage itself.⁵

A mortgagee of a stock of goods took possession thereof

¹ *Garden v. Bodwing*, 9 W. Va. 121. See, also, *Kuhn v. Mack*, 4 W. Va. 186.

² *Anderson v. Patterson*, 64 Wis. 557.

³ *Blakeslee v. Rossman*, 43 Wis. 116.

⁴ *Cotton v. Marsh*, 3 Wis. 221; *Fisk v. Harshaw*, 45 Wis. 665.

⁵ *Steinart v. Deuster*, 23 Wis. 136. See, also, *Oliver v. Town*, 28 Wis. 328.

and continued the business, making sales and replenishing the stock from time to time by the purchase of new goods. Judge Lyon says such additions became in equity, and as between the parties, part and parcel of the mortgaged stock, to be treated and accounted for as such.¹

The fact that a chattel mortgage authorizes a mortgagor to sell the goods and replenish them with others, to be paid out of the proceeds of such sales, does not affect the validity of the security, there being no agreement or understanding that he may dispose of the proceeds of the sales for his own use and benefit; but, says Judge Lyon, the attempt to extend the security of the mortgage over the after-acquired goods is probably unavailing, except, perhaps, as a license to seize such goods.²

¹ *Burr v. Dana*, 72 Wis. 639.

² *Roundy v. Converse*, 71 Wis. 524. See, also, *Allen v. Kennedy*, 49 Wis. 549.

Where the mortgagor remains in possession of any stock of goods or stock in trade, with permission from the mortgagee to make sales and apply proceeds upon the mortgage debt, the mortgagor must, at the end of every sixty days from the date of the mortgage, file in the office where the mortgage is filed, a true and correct verified statement in writing of all sales made, the amount to be applied on the debt, and the total valuation of all stock added to the original stock. A failure to file such statement makes the mortgage due, and makes it void as to third parties after fifteen days from the time such statement should have been filed. After payment of any chattel mortgage, the mortgagor may demand of the mortgagee, his personal representative or assignee, a certificate of such payment, and within ten days after receiving such certificate the mortgagor must file it in the office where the mortgage is filed and remove the mortgage from the files. Rev. Stat. §§ 2313-2317.

PART V.—RIGHTS OF PARTIES BEFORE DEFAULT.

CHAPTER XIV.

RELATIVE RIGHTS OF THE PARTIES.

ARTICLE I.—RIGHTS OF THE MORTGAGEE.

- 665. When Entitled to Possession.
- 666. Use of Violence by Mortgagee or his Agent.
- 667. What is Delivery and Possession.
- 668. Effect of Garnishment of Mortgagor.
- 669. Seizure Before Maturity of Debt.
- 670. Insecurity Clause.
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- 672. Illinois Rule.
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- 701. Estoppel.
- 702. Standing By and Making no Objection.
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§ 665. When Entitled to Possession.—As has already been stated, the mortgagee is entitled to possession when the

mortgage is executed, unless the instrument stipulates to the contrary. Upon default in any of the terms of the mortgage the mortgagee is entitled to take possession of the property, when in the hands of the mortgagor. Thus, a deed of trust or mortgage, with power of sale, of personal property, given to secure a valid indebtedness, though the possession is not given until the day after the execution of the instrument, vests the legal title and right of possession in the mortgagee, so long as the debt remains unpaid.¹

So the mortgagee, after condition broken, is entitled to possession of the entire property, though a part of it is covered by a junior mortgage, though he may have other security, or have relinquished his lien on a part of the property not embraced in the junior mortgage.² When no right has accrued to the mortgagee to take possession of the mortgaged property, he has no right to enter the mortgagor's house in his absence and take away the property without license, expressed or implied, from the mortgagor, although he believed he had cause to think the mortgagor would not return.³

§ 666. **Use of Violence by the Mortgagee or His Agent.**—The mortgagee or his agent has no right to use violence in taking possession of the property, as the law furnishes means to gain possession. And a stipulation which authorizes the mortgagee or his agent to enter the premises of the mortgagor and take therefrom the mortgaged property, conveys no right to enter, and by force and violence dispossess the mortgagor, when he is in peaceable possession, and especially when the mortgagee knows that the validity of the mortgage is denied by the mortgagor.⁴

§ 667. **What is Delivery and Possession.**—When a mortgagor makes a shipment of mortgaged property, such as grain, and it is lost, the question arises, who is to assume the loss, as between the mortgagor and mortgagee? An inter-

¹ *Jacoby v. Brigham* (Tex.), 7 S. W. Rep. 366.

² *Norris v. Hix*, 74 Iowa 524.

³ *McLeod v. Jones*, 105 Mass. 403.

⁴ *State v. Boynton*, 75 Iowa 753.

esting case occurred in California. By the terms of the chattel mortgage of wheat the mortgagor was to harvest the same and deliver it into possession of the mortgagee. A portion of the wheat was lost in shipment by railroad to the place of destination agreed upon by the parties. The lower court instructed the jury to the effect that if the wheat referred to was shipped in the name of the mortgagee, and the bill of sale taken in his name, with his knowledge and consent, then he was in possession and owner thereof, and was liable for any loss resulting from his own negligence or carelessness from those in his employ. The Supreme Court held, on appeal to it, that this instruction did not state the law, and was therefore erroneous.¹

§ 668. **Effect of Garnishment of Mortgagor.**—The mortgagee's right to the possession of mortgaged chattels is not affected by a garnishment instituted against the mortgagor.

The court says, per Cooley, C. J.: "We have serious doubts of the right to take from the mortgagee of chattels or the property upon which he has a lien, excepting where, for the protection of the rights of others, the necessity shall appear. It is a serious interference with his contract rights. It is a part of his security that the mortgage given him authorizes to take the property into his own possession; nothing which may subsequently be done by or against the mortgagor can rightfully diminish or affect his security. When a resort to legal remedies becomes essential, all parties concerned may be required to submit to some inconvenience and some loss, but in a case where, as in this case, the legal remedy is only sought for the purpose of reaching the surplus after a lien is satisfied, and the lien-holder is not concerned in the controversy, it cannot be rightful to make the burden or the costs of the litigation fall upon him, or to take from him substantial rights, for the convenience of the parties litigant."²

But after obtaining a judgment the creditor may have

¹ Perkins v. Eckert, 55 Cal. 400.

² Smith v. Menominee, 53 Mich. 560.

sold on execution the interest of the mortgagor in the property mortgaged, and for this purpose of levy might have taken possession temporarily.¹

§ 669. **Seizure Before Maturity of Debt.**—If a mortgagee avails himself of the stipulation in a chattel mortgage and takes possession of the property, or is about to do so before the debt falls due, he thereby confers upon the mortgagor the right to pay the debt and keep the property. The court, per Lyon, J., holds: "We hold that the tender divested the title of the mortgagee to the property just as effectually as a payment of the debts secured by the mortgages would have divested it; and if they took, carried away and sold the same after tender, against the remonstrance of the owner, they are guilty of conversion thereof, and the plaintiff (the owner) may maintain trover against them and recover the value of the property. We do not regard the fact of any importance that the most of the mortgage debts were not due at the time the property was seized. If a mortgagee avails himself of a stipulation in the mortgage to that effect, and takes possession of the mortgaged property, or is about to do so, before the debt secured by the mortgage falls due, he thereby confers upon the mortgagor the right to pay the debt and keep his property."²

And a mortgagee of chattels whose mortgage authorizes him, upon neglect or failure of the mortgagor to pay the debt secured, with interest, or to perform any of its covenants therein expressed, to "sell the said property or any part thereof, at public or private sale, and from the proceeds retain the amount of said debt and interest due at the time of such sale," and all costs, &c., rendering the surplus to the mortgagor, and also authorizes him, "for further security," to take the property into his possession at any time he thinks proper, commits a tort if he takes the property under the latter clause, before any default or breach of con-

¹ *Cary v. Hewitt*, 26 Mich. 228; *Macomber v. Saxton*, 28 Mich. 516; *Nelson v. Ferris*, 30 Mich. 497; *Haynes v. Leppig*, 40 Mich. 602.

² *Rice v. Kahn*, 70 Wis. 323.

dition on the part of the mortgagor, and sells the same after refusing to accept payment of the amount due; and an action for the conversion thereof will lie in favor of the mortgagor. "The defendant as mortgagee took possession of the mortgaged property with the intention of selling it, and did so sell it without any right whatever to do so. His pretense that he took possession of the property and sold it under the mortgage, or by virtue of the mortgage, can avail him nothing. The mortgage gives him no such right. So far as the defendant's conversion of the property is concerned, he was and is a stranger to the mortgage. * * * The defendant converted the property by refusing a tender of the mortgage-money, and threatening to sell the property, and selling it."¹

The temporary loan of a mortgaged horse is not such a breach of a condition of the mortgage that the mortgagor shall not remove the horse "from the place where it now is" without the consent of the mortgagee, as will entitle the mortgagee to the possession. Judge Elliott says the temporary loan of a horse to a neighbor is no such breach of the condition of the mortgage as entitles the mortgagee to take the property from the mortgagor. The nature of the property embraced in the mortgage is to be considered in determining what use may be made of it by the mortgagor, and, if the use is a reasonable one, there is no breach of the condition of the mortgage.²

Under such mortgage the provision cannot be so construed as to prohibit the mortgagor from using the horse and wagon which were embraced in the mortgage, in making a brief visit to her mother outside of the State. The removal, in order to constitute a breach, must place the mortgagee's rights in jeopardy, and it must be inconsistent with a legitimate use of the property by the mortgagor.³

§ 670. **Insecurity Clause.**—Where a chattel mortgage pro-

¹ *Harder v. Hosp*, 69 Wis. 288, opinion by Orton, J.

² *Jones v. Smith*, 123 Ind. 585.

³ *Walker v. Radford*, 67 Ala. 446.

vides that the debt shall draw interest and to be paid at a certain time named, there is an implied agreement that the mortgagor shall remain in possession of the property until default in the payment of the money, or some part thereof. The provision that if the mortgagee shall, at any time, feel unsafe or insecure he may seize and sell the aforesaid property, will not authorize the mortgagee to seize and sell the property before the debt becomes due, unless the mortgagor is about to do it, or has done something to impair the security.¹ Under such a clause the levy of an execution upon the mortgaged chattels as the property of the mortgagor gives the mortgagee a clear right to treat the condition of the mortgage as broken, and to reclaim possession by action at law if necessary, both as against the mortgagor and the officer making the levy.²

Or, if the mortgagor sell the property without the consent of the mortgagee, the latter, under the insecurity clause, may maintain an action of trover against the vendee.³ And if the mortgage covers other property not sold, it is not necessary to the right of recovery that the mortgagee shall show that the unsold property was insufficient to satisfy the mortgage debt.⁴

Under this clause, if the mortgaged property be seized under a distress warrant for rent, it entitles the mortgagee to immediate possession,⁵ or a levy of an execution upon the property entitles the mortgagee to an immediate possession.⁶

§ 671. **Presumption Under the Insecurity Clause.**—This clause generally provides that the mortgagee shall take possession when, in his judgment, he deems himself insecure. Upon his taking possession before the debt is due, because

¹ *Newlean v. Olson*, 22 Nebr. 717.

² *Welsh v. Sackett*, 12 Wis. 243; *Lewis v. D'Arcy*, 71 Ill. 648; *Frisbee v. Langworthy*, 11 Wis. 375; *Beach v. Derby*, 19 Ill. 617.

³ *Bailey v. Godfrey*, 54 Ill. 507.

⁴ *Bailey v. Godfrey*, 54 Ill. 507.

⁵ *Conkey v. Hart*, 14 N. Y. 22; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300.

⁶ *Ashley v. Wright*, 19 Ohio St. 291.

he considered himself insecure, the legal presumption is, as held by many courts, that such was the fact. He is the sole judge, and it lies in his own discretion, and no matter if his apprehensions are not well founded.¹

§ 672. **Illinois Rule.**—In this State the mortgagee must have a reasonable apprehension of insecurity, such as the danger of losing his debt by delaying its collection until maturity or danger of waste or removal of mortgaged property by the mortgagor.² He may take possession when he believes he has reasonable grounds to believe that he is in danger of losing his security from any cause arising after execution of the mortgage,³ and when sued in replevin for seizing the property he must prove he believed there was such danger.⁴

If goods are attached in possession of the mortgagor, the mortgagee may replevy them from the officer.⁵

His omission to take possession of the mortgaged property, under the insecurity clause, does not release his lien,⁶ and mortgagee's assignee succeeds to the mortgagee's rights under the insecurity clause.⁷

§ 673. **Minnesota Rule.**—Where a chattel mortgage contains an express or implied stipulation that the mortgagor shall remain in possession of the property until default, and likewise a provision, "whenever he deems himself insecure," the mortgagee has no right arbitrarily to take possession of the property before default of the mortgagor, but can only take it for just cause, based upon the actual existence of facts constituting a reasonable ground for believing himself insecure.⁸

§ 674. **As Against Creditors of the Mortgagor.**—A levy on

¹ Huebner v. Koebke, 42 Wis. 319; Cline v. Libby, 46 Wis. 123; Smith v. Post, 1 Hun (N. Y.) 516.

² Furlong v. Cox, 77 Ill. 293; Davenport v. Ledger, 80 Ill. 574.

³ Roy v. Goings, 96 Ill. 361.

⁴ Furlong v. Cox, 77 Ill. 293.

⁵ Lewis v. D'Arcy, 71 Ill. 648.

⁶ Wilson v. Rountree, 72 Ill. 570.

⁷ Beach v. Derby, 19 Ill. 617.

⁸ Gen. Laws 1879, ch. 65, § 2; Deal v. Osborne, 42 Minn. 102.

mortgaged property attaches only to the mortgagor's interest, and on default of payment of the mortgage debt, terminates the mortgagor's right of possession, and the mortgagee may maintain replevin against the officer.¹

Where a father and a son make a contract for the son's services to be rendered after he reaches the age of twenty-one years, at an agreed compensation, and the father afterwards executes to the son a chattel mortgage for wages accruing after such contract, a sheriff may be restrained at the suit of the son from selling the entire title to the mortgaged property under execution against the father.²

Where a mortgagor of chattels has the right to the possession of the mortgaged property until default, and an execution against him, and in favor of a third party, is levied by an officer upon the property, the levy attaches to and covers only the title of the mortgagor, and the mortgagee, after default, has the right to take possession of the property as against the officer.³

While the mortgaged chattels are in the custody of the mortgagee, he may lend or hire them to the mortgagor for occasional temporary use. Judge Hemingway says that there is nothing in the relation which the mortgagee sustains to the mortgagor that forbids to him the offices of ordinary kindness or of good neighborhood. "Therefore, the mortgagee may lend the mortgaged chattels to the mortgagor for occasional temporary use, without prejudice to his security."⁴

§ 675. **Purchaser Takes the Place of the Mortgagor.**—A purchaser claiming title to chattels bought from the mortgagor thereof stands in the place of the mortgagor, and cannot take advantage of a reservation in the mortgage in favor of the mortgagor, on the ground that such reservation is fraudulent, and renders the mortgage void.⁵

¹ Rankine v. Greer, 38 Kans. 343.

² Stratton v. Packer (N. J.), 14 At. Rep. 587.

³ Rankine v. Greer, 38 Kans. 343.

⁴ Garner v. Wright, 52 Ark. 385. See, also, Farnsworth v. Shepard, 6 Vt. 521.

⁵ National Bank v. Davidson, 18 Oreg. 57.

§ 676. **Legal Title.**—The legal title to the mortgaged property, with the right of possession, is in the mortgagee, and his right becomes absolute after the condition is broken; the mortgage vests a present title, defeasible upon a condition subsequent.¹

§ 677. **Michigan Rule.**—A chattel mortgage is a mere security and not a transfer of title. The legal title only vests in the mortgagee after foreclosure and sale. The mortgagee is only secured by a lien on the property mortgaged.²

§ 678. **Washington Rule.**—In this State a chattel mortgage is a mere security, under which no title can pass except by foreclosure and sale.³

§ 679. **Oregon Rule.**—Formerly, in this State, a chattel mortgage created a lien upon the property mortgaged, and did not pass any title until foreclosure.⁴ But this rule has been changed, and, after condition broken, the mortgagee may begin action to recover possession, if withheld by the mortgagor.⁵ Now, a chattel mortgage is held to be a con-

¹ *Musgat v. Pumpelly*, 46 Wis. 669; *Byron v. May*, 2 Pin. (Wis.) 443; *Judson v. Easton*, 58 N. Y. 664; *Bragelman v. Daue*, 69 N. Y. 69; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Brown v. Bement*, 8 Johns. (N. Y.) 98; *Talman v. Smith*, 39 Barb. (N. Y.) 390; *Blodgett v. Blodgett*, 48 Vt. 32; *Leach v. Kimball*, 34 N. H. 568; *Williams v. Dobson*, 26 S. Car. 110; *Wolff v. Farrell*, 3 Brev. (S. Car.) 68; *Reese v. Lyon*, 20 S. Car. 17; *Heyland v. Badger*, 35 Cal. 411; *Landon v. Emmons*, 97 Mass. 37; *Well v. Connable*, 138 Mass. 513; *Tompkins v. Batie*, 11 Nebr. 147; *Tallon v. Ellison*, 3 Nebr. 63; *Adams v. Nat. Bank*, 4 Nebr. 370; *Hill v. Merriman*, 72 Wis. 483; *Fletcher v. Neudeck*, 30 Minn. 125; *Manson v. Phoenix Ins. Co.*, 64 Wis. 28; *Pickard v. Low*, 15 Me. 48; *Nelson v. Wheelock*, 46 Ill. 25; *Frank v. Miner*, 50 Ill. 444; *Chipron v. Freikert*, 68 Ill. 284; *Broadhead v. McCay*, 46 Ind. 595; *Hamlyn v. Boulter*, 15 Kans. 376; *Pease v. Odenkirchen*, 42 Conn. 415; *Clark v. Whitaker*, 18 Conn. 543; *Woodman v. Chesley*, 39 Me. 45; *Ellinton v. Charleston*, 51 Ala. 166; *Kannady v. McCarron*, 18 Ark. 166; *Miller v. Pancoast*, 29 N. J. L. 250; *Robinson v. Campbell*, 8 Mo. 365; *McGuire v. Benoit*, 33 Md. 181; *Wilson v. Brannan*, 27 Cal. 258; *Ferguson v. Clifford*, 37 N. H. 86; *Bean v. Barney*, 10 Iowa 498; *Wolfey v. Rising*, 12 Kans. 535; *Thornhill v. Gilmer*, 4 S. & M. (Miss.) 153; *Bates v. Wiles*, 1 Handy (Ohio) 532; *Barnett v. Timberlake*, 57 Mo. 499.

² *People v. Bristol*, 35 Mich. 28; *Kohl v. Lynn*, 34 Mich. 360; *Cary v. Hewitt*, 26 Mich. 228; *Flanders v. Chamberlain*, 24 Mich. 305; *Randall v. Higbee*, 37 Mich. 40.

³ *Byrd v. Forbes*, 3 Wash. St. 318.

⁴ *Chapman v. State*, 5 Oreg. 432.

⁵ *Case v. Campbell*, 14 Oreg. 460.

ditional sale with defeasance, and the common-law definition has been accepted.¹

§ 680. **Action By Mortgagee.**—When the mortgagee is entitled to possession he may maintain action for the possession of the property against any one who detains it² or trover for the conversion of it.³

In Illinois, if the mortgagee takes possession under the insecurity clause, when he has no reasonable grounds for his apprehension, he will be liable to the mortgagor in trespass; or the mortgagor can bring replevin and be entitled to damages. If the taking is malicious, the jury may award exemplary damages.⁴

§ 681. **When Replevin Will Lie Before Maturity.**—The mortgagee may maintain replevin against the mortgagor for the property before maturity of the debt, if there be no stipulation that the mortgagor may retain possession.⁵

So, also, he may bring replevin, if the agreement empowers him to take possession and sell the property, whenever he deems himself insecure and a reasonable cause exists for such apprehension.⁶ Under a like clause he may bring replevin if the mortgagor, without his consent, sells or removes the property contrary to stipulations.⁷

But when the mortgage entitles the mortgagor to the possession until the maturity of the debt, the mortgagee cannot maintain replevin for the property, because he has not the immediate right to its possession.⁸ Otherwise, if the mortgagor has no agreement for his possession.⁹

If the mortgagor makes a breach of any of the conditions,

¹ *Hembree v. Blackburn*, 16 Oreg. 153.

² *Frisbee v. Langworthy*, 11 Wis. 375; *Welch v. Sackett*, 12 Wis. 243.

³ *Harvey v. McAdams*, 32 Mich. 472; *Grove v. Wise*, 39 Mich. 161.

⁴ *Davenport v. Ledger*, 80 Ill. 574.

⁵ *Ferguson v. Thomas*, 26 Me. 499.

⁶ *Lewis v. D'Archy*, 71 Ill. 648; *Chadwick v. Lamb*, 29 Barb. (N. Y.) 518.

⁷ *Russell v. Butterfield*, 21 Wend. (N. Y.) 300.

⁸ *Simmons v. Jenkins*, 76 Ill. 479; *Curd v. Wunder*, 5 Ohio St. 92; *Hathaway v. Brayman*, 42 N. Y. 322.

⁹ *Pickard v. Low*, 15 Me. 48.

the mortgagee has a right to bring replevin for the property.¹ If there be a clause in the mortgage that the mortgagee may take possession and sell the property whenever he deems himself insecure, he has no constructive possession until he has done some act asserting his right under the stipulation.²

§ 682. **When Demand for the Property Must be Made.**—In Arkansas, when the mortgagee has the right of immediate possession of the property, no demand is necessary before bringing an action to recover for its conversion.³ An unlawful taking requires no demand, but the general rule is that an unlawful detention by the mortgagor requires a demand to be made before suit.⁴

When the mortgagee has the immediate right of possession no demand is necessary in order to maintain an action of replevin against a subsequent purchaser from the mortgagor.⁵

In Michigan a demand is necessary both for a tortious taking and for a wrongful detention.⁶

§ 683. **When Trover Will Lie.**—A refusal to yield possession to the mortgagee when he has a right of possession is equivalent to a conversion, and he may bring trover.⁷ And whenever the mortgagee is entitled to possession he may bring trover as well before default as after.⁸ The mortgagee, after condition broken, has the legal title to the property, and the right to the possession thereof against everybody; and his right to recover against every person unlawfully

¹ *Quinn v. Schmidt*, 91 Ill. 84; *Ashley v. Wright*, 19 Ohio St. 291.

² *Skiff v. Solace*, 23 Vt. 279.

³ *Nordman v. Wilkins*, 28 Ark. 191.

⁴ *Monnot v. Ibert*, 33 Barb. (N. Y.) 24; *Roberts v. Norris*, 67 Ind. 386; *Henby v. Forgy*, 7 Ind. 284.

⁵ *Brale v. Byrnes*, 20 Minn. 435; *Partridge v. Swazey*, 46 Me. 414; *Pease v. Odenkirchen*, 42 Conn. 415.

⁶ *Cadwell v. Pray*, 41 Mich. 307. In Michigan a chattel mortgage is considered as a security and not a sale. The contrary doctrine belongs to the old theory of chattel mortgages, which treated them as sales and not as securities.

⁷ *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302; *Cutter v. Copeland*, 18 Me. 127; *Brown v. Cook*, 3 E. D. Smith (N. Y.) 123; *Cotton v. Marsh*, 3 Wis. 221; *Bates v. Wilbur*, 10 Wis. 415; *Wright v. Starks*, 77 Mich. 221; *Montgomery v. Kerr*, 1 Hill (S. Car.) 291; *Howard v. Burns* (Kans.), 24 Pac. Rep. 981.

⁸ *Spriggs v. Camp*, 2 Spears (S. Car.) 181.

converting the same in hostility to his rights as mortgagee, is just as perfect as if he had been the absolute owner thereof; the only difference being that, as against persons claiming under the mortgagor or his assignees, his right to damages would be limited to the amount due upon the mortgage.¹

In Kansas, if the party taking the mortgaged property has actual notice of the mortgage, and takes possession of the property in violation of the mortgagee's rights, he is guilty of conversion, and especially when all transpires within less than one year after the execution of the mortgage. This cause of action is not satisfied, annulled or barred by any failure on the part of the mortgagee afterwards to file a renewal affidavit.²

In general, a second mortgagee of a chattel, who takes the property from the mortgagor and sells it; and receives the full consideration of the sale, without regard to the rights of the senior mortgagee, is liable to the latter in an action for the conversion of the property.³

§ 684. **Possession in Case of Indemnity Mortgage.**—Under a mortgage of personalty to indemnify the mortgagee as security of the mortgagor, the mortgagee is not entitled to possession, in the absence of a provision in the mortgage, until he has paid the mortgage debt or part of it.⁴ But a mortgage given as indemnity, providing that if the note is not paid at the expiration of the time designated, the mortgagor shall deliver possession of the chattels, does not give him the right to continue in possession until the mortgagee is damaged as surety. In Illinois, if possession is retained after de-

¹ *Smith v. Konst*, 50 Wis. 360.

² *Corbin v. Kincaid*, 33 Kans. 649.

³ *Lowe v. Wing*, 56 Wis. 31; *Bailey v. Godfrey*, 54 Ill. 507; *Welch v. Sackett*, 12 Wis. 245; *Frisbee v. Langworthy*, 11 Wis. 375; *Gregory v. Thomas*, 20 Wend. (N. Y.) 19; *Frank v. Playter*, 73 Mo. 672; *Briggs v. Mette*, 42 Mich. 12.

The mortgagee may also maintain trespass for an injury to his property. *Cotton v. Watkins*, 6 Wis. 629; *Bates v. Wilbur*, 10 Wis. 415; *Cotton v. Marsh*, 3 Wis. 221; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333; *Volney Stamps v. Gilman*, 43 Miss. 456; *Hotchkiss v. Hunt*, 49 Me. 213; *Moore v. Murdock*, 26 Cal. 514; *Simmons v. Jenkins*, 76 Ill. 479; *Jones v. Webster*, 48 Ala. 109.

⁴ *Stonebraker v. Ford*, 81 Mo. 532.

fault in payment, the property is liable to be taken on a judgment creditor's execution against the mortgagor.¹

A party indorsed notes for the accommodation of another, who gave him a chattel mortgage as indemnity against loss, in case the mortgagee had to pay the notes. The notes were protested, and the mortgagee paid them. The property was levied upon and sold under execution. The mortgagee made a demand upon the officer levying the execution for the amount due. It was decided that the mortgagee could maintain an action for conversion of the property.²

§ 685. **Execution Creditor and Officer are Both Liable.**—Under the South Carolina law, when mortgaged property in the mortgagor's possession is, after default in payment, levied upon and sold, under a judgment against the mortgagor, both the execution creditor and the officer are liable to a personal action by the mortgagee for the conversion of the property.³

§ 686. **Rights Under Conditional Sale.**—A party was in possession of property under a conditional sale, the condition of which had been broken, leaving in dispute the vendee's title to the property. While in possession the vendee sold the property to another, taking back from him a conditional contract to resell the property.

The original vendor removed the property from his vendee's possession under claim of title. Then the subsequent or second vendee brought an action of conversion against him. It was decided that the transaction between the vendee and the last purchaser amounted merely to a mortgage to secure an indebtedness of vendee to the last purchaser, and an action would not lie if the removal was with the vendee's consent, since he had the right of a mortgagor in possession to transfer possession of the mortgaged property.⁴

¹ *Dunlap v. Epler*, 88 Ill. 82.

² *Bigelow v. Capen*, 145 Mass. 270.

³ *Williams v. Dobson*, 26 S. Car. 110.

⁴ *Jones v. Goodwillie*, 143 Mass. 281.

As to the rule in conditional sales concerning delivery of possession, see *Harkness v. Russell*, 118 U. S. 663. This case is a resumé of this subject.

§ 687. **As to Receivers.**—The rightful possession of a mortgagee of chattels, after default, cannot be molested by a receiver appointed over the estate of the mortgagor.¹

The fact that there are unsettled accounts between the parties, or that the mortgagor has a claim, which if valid might be set off against the sum due on the mortgage, will not entitle him to an injunction against the mortgagee's selling, or to the appointment of a receiver to make the sale and keep the proceeds until the accounts are settled between the parties, so long as the mortgagor's claims are not established, or the amount thereof adjusted.²

The appointment of a receiver of mortgaged property in possession of the mortgagee, will only be made in case of pressing and apparent necessity, in order to secure the rights of the mortgagor or others claiming under him. To make the appointment in any other case would impair the obligation of the contract between the parties, and would be beyond the constitutional power of the court.³ It will not be made over a mortgagee in possession when he claims upon oath a balance due him, much less where the debtor himself states such a balance, and admits that the property is inadequate to pay such balance.⁴ In general, when a receiver is appointed to take possession of the chattels mortgaged by the principal debtor, but in the hands of the mortgagee, he may be empowered to examine and inventory the property for the purpose of an intelligent sale; but his proceedings must be at the expense of the fund realized on the sale, and not at that of the mortgagee. And no sale can be made unless more than the mortgaged security can be realized; and if made at all, it must be a sale in gross, subject to the mortgagee's lien, and not sold in parcels.⁵

A receiver derives his authority from the act of the court

¹ *Hammond v. Solliday*, 8 Colo. 610.

² *Bayaud v. Fellows*, 28 Barb. (N. Y.) 451.

³ *Patten v. Accessory Trans. Co.*, 4 Abb. Pr. (N. Y.) 235.

⁴ *Bayaud v. Fellows*, 28 Barb. (N. Y.) 451; *Quinn v. Brittain*, 3 Edw. (N. Y.) 314.

⁵ *Smith v. Menominee*, 53 Mich. 560.

appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled to it, but not to change the title, or even the right of possession in the property.¹

§ 688. **Appointment of Receiver Before Default.**—When the mortgagee apprehends danger of loss of the mortgaged property, he may have a receiver appointed, even before his right to foreclose has accrued.² A receiver will be appointed when it is shown that such action is necessary for the mortgagee's protection, although the time of payment has not arrived.³

§ 689. **May Avoid a Chattel Mortgage.**—A receiver of the property of a corporation may avoid a chattel mortgage upon property of the corporation on the ground that it was not filed as required by law. A receiver has the power to enforce the rights which the creditors, but for the proceedings, might have enforced in their own behalf. The appointment of a receiver is intended to facilitate and not to hinder a complete remedy to creditors; this cannot be done unless such appointment is to apply, to the satisfaction of the creditor's debts, all the property of the corporation applicable to that purpose—that is, all the property which, but for the proceedings, they could have so applied. For these reasons a receiver may avoid any transfer void as to creditors.⁴

§ 690. **Evidence.**—In conversion for property taken by the mortgagee, the chattel mortgage authorizing him to take possession when he should deem himself insecure, the mort-

¹ *Skip v. Harwood*, 3 Atk. 564; *Anon.*, 2 Atk. 15; *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Ellis v. Boston, &c., R. R. Co.*, 107 Mass. 1; *Maynard v. Bond*, 67 Mo. 315; *Herman v. Fisher*, 11 Mo. App. 275.

² *Rose v. Bevan*, 10 Md. 466; *Claggett v. Salmon*, 5 G. & J. (Md.) 314.

³ *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93.

⁴ *Farmers Loan and Trust Co. v. Minneapolis Eng. and Mach. Works*, 35 Minn. 543.

An assignee in bankruptcy may avoid a chattel mortgage, void as to creditors for want of filing. *Bank v. Hunt*, 11 Wall. (U. S.) 391.

gage is admissible in evidence without producing the note it was given to secure, or accounting for its absence.¹

A general objection to a chattel mortgage as evidence, without specifying any ground, will not reach an objection that, presumably, might have been obviated if specifically pointed out. When a particular objection might be obviated if made, and is not, it will be deemed to have been waived. In Illinois the Circuit Court of one county will not take judicial knowledge of the official character of the justice of the peace of another county before whom the chattel mortgage was acknowledged.²

§ 691. **Parol Evidence.**—Whether parol evidence is admissible to prove that, at the time of making the mortgage, it was agreed that the mortgagor should continue in possession until default in some of the conditions, is a question upon which the decisions are in conflict. Some declare such evidence to be admissible, because such an agreement does not contradict the written mortgage.³

§ 692. **Loss of Notes.**—The loss of the notes given with the chattel mortgage, after the property has been sold by an officer in behalf of the mortgagee, does not affect the legality of the seizure, and in an action by an innocent purchaser, involving the title to the property, the mortgage is admissible, and also testimony as to the loss.⁴

When the action is against a third person, and the mortgage fully describes the debt, it is not necessary to prove the contents of the note by producing and proving the note itself in order to sustain the mortgage.⁵ The nature of the mortgagee's title and the evidence of it are matters of evidence only.⁶

¹ *Hill v. Merriman*, 72 Wis. 483.

² *Weber v. Mick*, 131 Ill. 520.

³ *Colman v. Packard*, 16 Mass. 39; *Case v. Winship*, 4 Blackf. (Ind.) 425; *Pierce v. Stevens*, 30 Me. 184.

⁴ *Howard v. Witters*, 60 Vt. 578; *Smith v. Johns*, 3 Gray (Mass.) 517; *Brooks v. Briggs*, 32 Me. 447.

⁵ *Quinn v. Schmidt*, 91 Ill. 84.

⁶ *Harvey v. McAdams*, 32 Mich. 472.

§ 693. **Arrangement Made Prior to the Levy of an Attachment—Evidence of.**—In replevin for attached chattels by one claiming under a chattel mortgage from the debtor, which authorized him to take possession after the default of thirty days, it is error to overlook evidence of an arrangement made prior to the levy of the writ, between the debtor and the mortgagee, by which the latter was to have immediate possession of the goods, and to charge that the plaintiff could not recover unless some of the debt secured had become due thirty days prior to the suit.¹

§ 694. **Pleadings.**—A complaint by a mortgagee for wrongful seizure of the mortgaged goods which shows that the mortgage debt was not due when the complaint was filed, need not allege its non-payment.²

A prayer of a petition asked for an injunction restraining a party from seizing the mortgaged goods under a writ of attachment without first paying or depositing the amount of the mortgage debt, and for general relief.

The mortgagee had the right, under the mortgage, to take possession whenever he deemed it necessary, and the mortgage was alleged to have been given to secure a valid debt, and to have been recorded before the attachment. Held, that the petition was not demurrable as to whether or not the mortgagee was entitled to the particular relief demanded. His right to possession might have been determined under the general prayer.

Questions as to the right of possession of personal property are within the jurisdiction of courts of law, and it makes no difference, as an error in the kind of proceedings adopted and is no ground of demurrer.³

A complaint alleged the execution of a chattel mortgage, and the wrongful conversion of the property covered thereby, being based, not on the mortgage, but on the conversion; held, that the mortgage is not made a part of the complaint

¹ Hyde v. Shank, 77 Mich. 517.

² Morcum v. Coleman, 8 Mont. 196.

³ Thomas v. Farley, 76 Iowa 735.

by filing a copy with it. And where a complaint shows a sale by the mortgagor of mortgaged chattels, a removal by the purchaser and their destruction by fire while in the purchaser's hands, it is sufficient, though it does not allege directly a conversion by him.¹

§ 695. **Measure of Damages.**—The damages which a mortgagee can recover is the full value of the property converted at the time of the wrongful detention. He is not obliged to look to the personal responsibility of the mortgagor, or to show his insolvency, before recovering from the wrong-doer. Neither is he obliged to look to any other security he may hold.² But he cannot have full value of the property if that exceeds the mortgage debt and costs. He can recover, when the property has been wrongfully replevied from him, all damages suffered from the taking, up to the amount of the mortgage debt.³

§ 696. **Injunctions.**—The mortgagee is not entitled to an injunction restraining a sale of the mortgaged property under execution by a creditor of the mortgagor, when the property was in the possession of the mortgagee when it was seized, provided the property be such that its value is ascertainable and measurable in money; for in such case the remedy at law is sufficient.⁴ The mortgagor can be restrained from disposing of after-acquired property, if it would injure the mortgagee's security to a great extent, and be irreparable.⁵ After default the absolute title vests in the mortgagee, and he has a legal remedy sufficient to protect his interest, and an injunction will not lie.⁶ But before default a mortgagor may be restrained from removing the property beyond the reach of the mortgagee, or from placing it where it will not be forthcoming for the satisfaction of the debt.⁷

¹ *Ross v. Menefee* (Ind.), 25 N. E. Rep. 545.

² *Worthington v. Hanna*, 23 Mich. 530.

³ *Smith v. Phillips*, 47 Wis. 202.

⁴ *La Mothe v. Fink*, 12 Chi. Leg. N. 152; 8 Biss. 493.

⁵ *Wood v. Rowcliffe*, 3 Hare 308.

⁶ *Adams v. Nat. Bank*, 4 Nebr. 370.

⁷ *Claggett v. Salmon*, 5 G. & J. (Md.) 314.

§ 697. **As to Other Creditors.**—A mortgagee of chattels may enjoin proceedings against the property by other creditors, where, by the terms of the mortgage, possession is to be retained by the mortgagor until condition broken.¹

§ 698. **Judicial Sale of the Property Not Enjoined.**—When the mortgagee has taken possession with a view of selling the property in satisfaction of the debt, he is not entitled to an injunction to prevent a judicial sale of the chattels under execution against the mortgagor. In such case, the property having no especial value, and its real money value being readily ascertainable, whatever damages may be sustained by the mortgagee by reason of the sale under execution may be readily determined and compensated by an action at law. Nor does the fact that the mortgagee, in such case, cannot avail himself of all possible legal remedies, entitle him to relief by injunction, if any form of action at law is open to him in which a complete and adequate remedy may be had. Justice Dyer, of the United States District Court of Wisconsin, said: "Accepting the allegations of the bill as true, and admitting that complainant was in possession and held the legal title to the property when it was seized, the question is whether there is such want of adequate remedy at law as entitles complainant to come into a court of equity for relief by injunction to restrain the threatened disposition of the property at execution sale. There is a familiar class of cases cited in the elementary works, in which, on account of antiquity or historical character or other peculiar value, jurisdiction in equity was entertained to prevent the transfer, or defacement, or other injury of articles of personal property, or to compel their specific delivery. But it is stated that these were cases where the articles were of peculiar value and importance, and the loss of which could not be fully compensated in damages. Such was the case of the silver altar-piece bearing a Greek inscription, and of curious antiquity, and which could not be

¹ *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

replaced in value, *Somerset v. Cookson*, 3 P. Will. 390; and of the horn which constituted the tenure by which an estate was held, *Pusey v. Pusey*, 1 Vern. 273; and of the silver tobacco-box, *Fells v. Read*, 3 Ves. 70; and of the masonic dresses and decorations, *Lloyd v. Loaring*, 6 Ves. 773. Other similar cases involving articles of property which were family relics or heirlooms, are reported in 13 Ves. 95; 3 Ves. & B. 16, 17, 18, and 10 Ves. 140, 148, 163. All these were cases where the chattels were articles of antiquity or curiosity, or were memorials of affection, or constituted insignia of office, and equitable interposition to preserve them to the owner *in specie* was sustained on the ground that they were of peculiar character and value, and that the recovery of their intrinsic value in money would not be adequate satisfaction to the owner. There is another class of cases in which courts of equity have interposed to protect the owner of specific chattels in the beneficial enjoyment and use of them *in specie*. As where certain articles of property were placed in the hands of an agent to be held for the owner, and the agent has threatened to dispose of them to a third party, in violation of his trust. The ground upon which equitable relief in such cases has been afforded is found to be in the fiduciary relation which existed between the parties, together with the threatened mischief. *Wood v. Rowcliffe*, 3 Hare 308.

“The principle upon which jurisdiction may be invoked to grant relief by injunction or decree for specific delivery of personal property in the classes of cases mentioned, is plainly not applicable to the case at bar, for here the case is simply that of seizure and threatened sale upon execution of ordinary personal property, the entire and actual value of which for all purposes is ascertainable, and is wholly measurable by money, and which the alleged owner holds only for purposes of sale and conversion into money, to satisfy a debt.
* * * Now, bearing in mind that the application to a peculiar case of the principle that the absence of a plain and adequate remedy at law offers the only test of equity

jurisdiction, must wholly depend upon the character of the case itself, it must be said of the case at bar that it presents no peculiar or extraordinary features, and that it is plainly distinguishable from the cases that have been noticed, in which relief by injunction was successfully invoked.

“Why is not complainant’s remedy at law, taking the facts as averred in the bill, plain and adequate? She alleges that she took possession of the property in question under her mortgage. She in effect claims legal title. She took possession and held the property for one purpose only, namely, to sell and convert it into money for satisfaction of her debt. The property is not of peculiar character or value. Its value is readily ascertainable. It has only for her a money value. A recovery of its value affords complete compensation. Whatever damages she may sustain by execution sale of the property can be completely acquired at law. * * * Plain and adequate remedy at law does not mean an ability to resort to every remedy which the forms of legal procedure give. If any form of action at law will give a complete and adequate remedy, then she is within the principle which tests the right to request equity.

“In an action at law for the alleged trespass, or for conversion, or for conversion of the property, the measure of damages would be the value of the property when taken, with interest from the time of the taking to the time of the trial, and this would, under the facts as averred in the bill, cover all damages sustained.

“Moreover, in determining value, the complainant would not be restricted to amounts realized for the property by the marshal on execution sale. She would be at liberty to recover actual value, though the marshal might not have realized one-half such value.”

Injunction was denied.¹

§ 699. **When Allowed.**—An injunction will be allowed to

¹ *La Mothe v. Fink*, 8 Biss. C. C. 493.

restrain a sheriff from selling the interest of the mortgagee upon execution issued in favor of the creditors of the mortgagor. Thus, where a father and son make a contract for the son's services, to be rendered after attaining the age of twenty-one years, at an agreed compensation, and the father afterwards executes to the son a chattel mortgage for wages accruing after such contract, the sheriff may be restrained, at the suit of the son, from selling the entire property under execution against the father. The court says, per Bird, Vice Chancellor :

"Has the court the power to enjoin the sheriff in such cases? It has. First, because the sheriff proposes to sell not only the equity of the mortgagor, but also the interest, so far as possible, of the mortgagee. Clearly enough it was, and is, lawful for him to seize upon and sell the former. But it is equally clear that he could not sell the latter if the mortgage be valid and free from fraud. Secondly, because such sale by the sheriff would involve the complainant in litigation with every purchaser to whom the sheriff should deliver the goods, and compel him to institute a great many suits. These things, however, are all predicated upon the condition that the chattel mortgage is itself lawful in all respects."¹

§ 700. **Where Consideration Fails.**—When a promissory note, secured by a chattel mortgage, is given to one as trustee for another, and the real owner becomes insolvent, the maker may maintain a bill for an injunction to restrain the payee from transferring the note before maturity and from foreclosing the mortgage, upon the ground of failure of consideration in the original transaction.²

§ 701. **Estoppel.**—A mortgagee is not, in the absence of fraud, precluded from recovering upon a mortgage debt, because he permits the property covered by the mortgage to be sold under an inferior claim or lien. His failure in such

¹ *Stratton v. Packer* (N. J.), 14 At. Rep. 587.

² *Belohradsky v. Kuhn*, 69 Ill. 547.

case to assert his right under the mortgage does not estop him from recovering the indebtedness secured thereby in an action against the mortgagor.¹

A second mortgagee, by consenting to a sale of the property by the mortgagor discharged of his mortgage, does not estop himself from setting up against the purchaser a title subsequently acquired by assignment of the first mortgage.² And if the mortgagee consents to the sale of a portion of the mortgaged property to one who undertakes to pay part of the debt, with the understanding that the mortgage lien shall continue, and such person sells to one who knows nothing of this agreement, the mortgagee may follow the property into the hands of the last purchaser.³

§ 702. **Standing By and Making No Objection.**—A mortgagee of personal property does not release the property from a lien of his mortgage by his mere silence, or being informed that a part of the property has been disposed of by the mortgagor and delivered to another creditor. His assent to the delivery or other disposition of the mortgaged property might operate to release it so as to protect a third party.⁴

Where the owner of goods stands by and, without objection, allows another to treat them as his own, and a third party is thereby led to purchase them in good faith, the owner cannot recover such goods or their value from the purchaser.⁵ But a mere declaration, by the mortgagee of personal property, on learning from the mortgagor that he had sold it, that he cared nothing about the property, and did not want it, does not preclude him from asserting his title under the mortgage.⁶ But if the mortgagee should buy

¹ *Jones v. Turck*, 33 Iowa 246.

² *Clark v. Hale*, 8 Gray (Mass.) 187.

³ *Oswald v. Hayes*, 42 Iowa 104.

⁴ *Patterson v. Taylor*, 15 Fla. 336.

⁵ *Thompson v. Blanchard*, 4 N. Y. 303; *Gregg v. Wells*, 10 Adol. & El. 90; *Demeyer v. Souzer*, 6 Wend. (N. Y.) 436; *Dezell v. Odell*, 3 Hill (N. Y.) 215; *Pickard v. Sears*, 6 Adol. & El. 469.

⁶ *White v. Phelps*, 12 N. H. 382. See, also, *Rice v. Chase*, 9 N. H. 179.

at a sale under execution, at the suit of a third person, he extinguishes his lien. He cannot afterwards maintain an action on the mortgage debt against the mortgagor. His title as mortgagee has become merged with his title as general owner.¹

§ 703. **Giving Preference to a Second Mortgagee.**—A mortgagee of personal property may, by representation made in procuring the mortgage, give preference to the claim of another over his own, but he cannot use his mortgage to protect other creditors against a subsequent mortgagee.²

When the mortgage does not reserve any benefit to a third party, it cannot be made to cover indebtedness owing by the mortgagor to others besides the mortgagee. Any verbal agreement to that effect by the parties, unknown to a subsequent mortgagee, will not bind him. When the first mortgagee's debt is paid, no secret trust in favor of a third party can defeat the rights of the subsequent mortgagee.

So, if a third party, with knowledge of the junior mortgagee's rights, takes the mortgaged property and converts it to his own use, he is liable to the subsequent mortgagee for his debt, it being proved that the property is, at least, of that value. If the first mortgage is satisfied the junior mortgagee will have the right to the possession of the property against one not claiming rightfully under the first mortgage, nor by virtue of a better title.

¹ *Merritt v. Niles*, 25 Ill. 282.

² *Hunt v. Daniels*, 15 Iowa 146. See, also, *Poland v. Railroad Co.*, 52 Vt. 144.

ARTICLE II.—RIGHTS OF THE MORTGAGOR.

- 704. Mortgagor in Rightful Possession.
- 705. Action by Mortgagor.
- 706. Mortgagor's Defense.
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- 731. Contrary Doctrine.
- 732. A Mortgagor Cannot Set up Title in Another.
- 733. Purchase-Money.
- 734. Vendor's Lien.
- 735. Selling the Property by the Mortgagor—New Mortgage.
- 736. Duration of Lien.

§ 704. **Mortgagor in Rightful Possession.**—The mortgagor may defend his possession against the mortgagee when the latter disturbs his rightful possession. So, when a mortgage, by its terms, preserves the right of possession in the mortgagor until default is made, the mortgagor can protect his right against the mortgagee.¹

And when the instrument specifically defines the circumstances under which the right of possession is to vest in the mortgagee, the law implies an intent that right of possession is to remain in the mortgagor.²

¹ *Ford v. Ramson*, 39 How. Pr. (N. Y.) 429; *Pierce v. Hasbrouck*, 49 Ill. 23.

² *Hall v. Sampson*, 35 N. Y. 274.

A mortgagor retaining possession has a right to sue a turnpike company for damages to the chattels by its defective road. Thus, a mortgagor sued the company for injuries to horses, resulting in the death of one of them, and destruction of a separator, alleged to have been occasioned by defective and improperly-constructed road. The defendant plead the want of property in the mortgagor.

The horse killed and the one injured belonged, at the time of the accident, to the mortgagor, but the separator had been bought by the mortgagor and another party, who gave their notes for it. It appeared that in May, 1887, the accident being in July following, the mortgagor and the other vendee had mortgaged the separator. The court said, per Snodgrass, Justice, that it was intended, on a fair construction of the mortgage, that the mortgagors were to retain possession and use of the property; while so doing it was destroyed, or so wrecked as to be entirely ruined in the accident. The defendants insisted that the title was in the mortgagee, who alone could sell, but the court thought that the defense was not well founded, the mortgagor being lawfully in possession until default.¹

§ 705. **Action by Mortgagor.**—A mortgagor cannot maintain trover against a mortgagee rightfully in possession, because he has no title, either general or special; his only right is to redeem in equity where that right is recognized.² Neither can he maintain trespass against a mortgagee rightfully in possession of the property, for he has neither the property nor any right of possession. His remedy is by an action on the case or by a bill to redeem.³ Neither can he maintain replevin against a mortgagee who has obtained possession of the property for a breach of a condition, upon

¹ Turnpike Co. v. Fry, 88 Tenn. 296; and see Orser v. Storms, 18 Am. Dec. 547-552, note.

² Holmes v. Bell, 3 Cush. (Mass.) 322; Heyland v. Badger, 35 Cal. 404; Brown v. Bement, 8 Johns. (N. Y.) 96; Burdick v. McVanner, 2 Denio (N. Y.) 170.

³ Leach v. Kimball, 34 N. H. 568.

the ground that the consideration of the mortgage was illegal.¹

§ 706. **Mortgagor's Defense.**—The payment of a debt, although it be made by one who is not a party to the contract, and although the assent of the debtor to such payment does not appear, is still an extinguishment of the demand. The title will then vest in the mortgagor, and he may plead payment in an action of trover against him by the mortgagee.

The court says that a payment and discharge of a debt, no matter by whom effected, can be nothing more nor less than its extinguishment as a demand. As between the parties who paid it and him for whose benefit it was intended, a question might arise whether it was purely voluntary or not, which would depend on the circumstances of previous request or subsequent assent, either express or implied.²

So, although the debt be not paid, the mortgagor may plead in bar to such action a parol release of the mortgage, either by an agreement by the mortgagor to do certain things, or the performance of those things by him.³

A mortgage, although under seal, is a security for the payment of a debt. So far as it conveys to the mortgagee title to personal property, he may release or discharge it by a sufficient parol agreement—by a subsequent valid verbal agreement.⁴

Rice, C. J., says: "A man may always waive a condition in his own favor and dispense with its performance. Every verbal contract is to be interpreted in connection with the surrounding circumstances; and the conduct and acts of the parties, in carrying out the engagement they have entered into, may be regarded in order to see what interpretation

¹ *Fikes v. Manchester*, 43 Ill. 379; *Dougherty v. Bonavia*, 124 Mass. 210.

² *Harrison v. Hicks*, 1 Port. (Ala.) 423. See, also, *Bellamy v. Doud*, 11 Iowa 285; *Davis v. Hubbard*, 38 Ala. 185.

³ *Cartwright v. Cooke*, 3 Barn. & Ad. 701; *Bradley v. Gregory*, 2 Camp. 383; *Evans v. Powis*, 1 Exch. 601.

⁴ *Wallis v. Long*, 16 Ala. 738; *Deshazo v. Lewis*, 5 S. & P. (Ala.) 91.

they have themselves put upon it, and what conditions have been waived or performed.¹

§ 707. **Execution Levied on Remaining Interest of Mortgagor.**—After a party had given a chattel mortgage upon a stock of goods, the goods were seized by a constable under an execution issued upon a judgment against the mortgagor. The owners of the chattel mortgage brought an action of replevin against the constable and took the goods from him. It was decided by the court that after the levy made by the constable, the mortgagor had neither the possession nor the right to the possession of the goods, and that he could not maintain an action against the owners of the mortgage to recover any balance that might remain after deducting the amount due upon the mortgage and the execution held by the constable;² that the constable holding the execution was entitled to recover of the owners of the mortgage the full amount of the mortgagor's special interest in the goods levied upon and not merely the amount named in the execution; that, consequently, the owners of the mortgage were not liable to the plaintiff for the same special interest.³

§ 708. **Measure of Damages.**—In such case, the measure of damages for the mortgagee's wrongful interference is the value of the right of possession until forfeiture of the condition of the mortgage, and the value of the property after payment of the debt.⁴ In case of a mortgagee's taking unlawful possession of the mortgaged goods after they have been lawfully attached by a creditor of the mortgagor, the measure

¹ *Acker v. Bender*, 33 Ala. 230; *Morgan v. Smith*, 29 Ala. 283; *Banker v. Bell*, 37 Ala. 354.

No one but the mortgagor, or some one having his title, can object to the mortgagee's taking possession before he has a right to under the mortgage. Strangers cannot make any valid objection. *Gaar v. Hurd*, 92 Ill. 315; *McConnell v. Scott*, 67 Ill. 274.

A sale of the mortgaged property before foreclosure, by the mortgagee, is a conversion, and he becomes liable to the mortgagor. *Matthews v. Fisk*, 64 Me. 101; *Spaulding v. Barnes*, 4 Gray (Mass.) 330.

² *Michelson v. Fowler*, 27 Hun (N. Y.) 159, opinion by Landon, J.

³ *Buck v. Remsen*, 34 N. Y. 383.

⁴ *Blodgett v. Blodgett*, 48 Vt. 32; *Brown v. Phillips*, 3 Bush (Ky.) 656; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300.

of damages in replevin by the officer is the value of the property over and above the mortgage debt.¹ If special damages are sought to be recovered, they must be alleged and claimed in the declaration or complaint.² The Iowa court lays down the rule that where a mortgagee of chattels takes possession under a clause allowing him to do so, and, then wrongfully sells them before the maturity of the note secured, the measure of damages against him for the conversion is the difference between the price obtained and the market price at the time of the sale. Judge Granger says:

"The rule of damages in cases of sales of property and a failure to deliver is differently applied in the United States.

* * * In *Brown v. Allen*³ the question arose as to the measure of damages for wrongfully entering a warehouse and removing corn. * * *

'The market value is the measure of damages.' There is certainly no reason for holding to such a rule in that case and a different one in this.

* * * Adopting as applicable to the facts of this case, the rule in that, the market value of the property at the time of sale is a correct one."⁴

§ 709. **Injunctions.**—The mortgagor may, in proper cases, have the mortgagee enjoined from taking possession. If he has a right to possession for a time certain he may hold the property until expiration of that period.⁵ But when the mortgage contains an insecurity clause, the court will not enjoin the mortgagee from taking possession.⁶ And generally, an injunction to restrain the mortgagee from exercising the power of sale conferred by the chattel mortgage will not lie, because the mortgagor has ample remedy at law.⁷

§ 710. **Selling Mortgaged Property.**—The mortgagor, be-

¹ *Saxton v. Williams*, 15 Wis. 292.

² *Brink v. Freoff*, 44 Mich. 69.

³ 35 Iowa 306.

⁴ *Gravel v. Clough* (Iowa), 46 N. W. Rep. 1092.

⁵ *Ford v. Ramson*, 8 Abb. Pr. (N. Y.) N. S. 416.

⁶ *Cline v. Libby*, 46 Wis. 123.

⁷ *Lawson v. Barton* (Ark.), 7 S. W. Rep. 387.

fore forfeiture, no statute to the contrary, may sell the mortgaged property, subject to the mortgage lien.¹ Such a sale does not amount to a conversion, either as to the mortgagor or to the purchaser.²

The purchaser from the mortgagor obtains his rights only and no other,³ and a purchaser from a subsequent mortgagee acquires his interest and nothing else.⁴

But a purchaser from the mortgagor, with notice of a stipulation by him not to sell or dispose of the property, becomes liable to the mortgagee for conversion.⁵

§ 711. **Grain Merchant—Buying Mortgaged Crops After Harvest.**—A Nebraska case, though not in accord with the weight of authority, holds that the mortgagor of chattels, in his possession until foreclosure, possesses a beneficial interest in the property mortgaged, and can convey a good title by a sale of such property to one who purchases in the open market in good faith, and without notice, actual or constructive, of the mortgage.

Thus, a chattel mortgage upon growing grain is not constructive notice to third parties of the mortgage on the grain thereafter lawfully placed in crib or bin; and a dealer in grain who, in good faith, in open market, buys the grain, is not liable to the mortgagee. The court says, if the mortgage lien continues on the grain after harvest, as notice to third parties, why may not the mortgagee follow the grain to Chicago, New York, or, in case of its shipment, to England or France, to the parts of either country? No one could contend for such a rule, yet, if the first purchaser is chargeable with notice of a secret lien, why is not the second, third, or more remote purchaser? The mere statutory rule, no doubt, is to require the mortgagee to look after his security, and, if change is made in its character, to see

¹ *Chapman v. Hunt*, 13 N. J. Eq. 370; *Cadwell v. Pray*, 41 Mich. 307; *Davis v. Blume*, 1 Mont. 463; *Daly v. Proetz*, 20 Minn. 411.

² *Hathaway v. Brayman*, 42 N. Y. 322.

³ *Hammond v. Plimpton*, 30 Vt. 333; *Arnold v. Stock*, 81 Ill. 407.

⁴ *Hale v. Nat. Bank*, 39 N. Y. Supr. Ct. 207.

⁵ *Fisher v. Friedman*, 47 Iowa 443.

that his mortgage still imparts notice of his lien on the property to third parties.¹

This case is in accord with the weight of authority as to the rights of a landlord to seize his tenant's crop. The principal difference is that the lien of a mortgagee is the result of contract, while that of the landlord is expressly and specifically given by the statute, without reference to the contract of the parties, and this difference does not affect the question under consideration.²

In Illinois it is held in one case that the landlord's statutory lien upon crops grown on the land demised does not follow such crops into the hands of a *bona fide* purchaser without notice,³ and this decision follows the great weight of authority.⁴

§ 712. **The Weight of Authority.**—The weight of authority is opposed to the Nebraska case. Thus, in Indiana, the decision is most emphatically opposed to this doctrine. Accordingly, where growing wheat was mortgaged, and the mortgage duly recorded, and afterwards the mortgagor, without the consent or knowledge of the mortgagee, harvested, threshed, removed and sold the wheat, and the grain merchant converted it to his own use by mixing it with other, it was held, first, that the title to the grain was vested in the mortgagee, and the recording of the mortgage was constructive notice to the purchaser; second, that the mortgagee could recover the value of the wheat of the purchaser by identifying the wheat purchased as the wheat that was mortgaged, though the purchaser bought the wheat in the usual course of trade and without actual notice.⁵

So, in New York, a party executed a mortgage upon growing grass, which the mortgagor cut and stacked upon other land occupied by him, and was retained in his posses-

¹ Gillilan v. Kendall, 26 Nebr. 82, opinion by Maxwell, J.

² Kennard v. Harvey, 80 Ind. 37.

³ Howe v. Clark, 23 Ill. App. 145; contra, Finney v. Harding, 32 Ill. App. 98.

⁴ Nesbitt v. Bartlett, 14 Iowa 485; Westmoreland v. Wooten, 51 Miss. 825; Scaife v. Stovall, 67 Ala. 237; Fowler v. Raply, 15 Wall. (U. S.) 328; Webb v. Sharp, 13 Wall. (U. S.) 14; Beall v. White, 94 U. S. 382.

⁵ Duke v. Strickland, 43 Ind. 494.

sion for several months, when it was levied on by an execution against the mortgagor. It was held that the hay was subject to the mortgage.¹

And, in California, a chattel mortgage upon growing crops, as against an attaching creditor, continues to be a lien upon the crop in the possession of the mortgagor after it is severed and removed from the land; that a chattel mortgage holds the property mortgaged, not only during the growing of the crop and after its severance, but until released by the mortgagee or until barred by the statute of limitations.²

The Illinois case makes a difference between a landlord's lien and a chattel-mortgage lien. It holds that in the case of a chattel-mortgage lien the purchaser is charged with constructive notice.³ And other cases hold that a landlord's lien does hold the crop after harvest even though sold in open market.⁴ In Oregon, the courts hold that the mortgage is a lien on the money received for the crop after sale.⁵ In Kansas⁶ the grain merchant, as to mortgaged grain, would be responsible to the mortgagee. The same doctrine is held in Minnesota⁷ and Dakota.⁸

§ 713. **Sale by Oral Consent.**—The mortgagor can make a valid sale of the mortgaged property with the oral consent of the mortgagee.⁹

Some of the States have a law whereby the consent of the mortgagee must be in writing; but then, if the mortgagee consents orally to the sale, the purchaser in possession will

¹ *Smith v. Jenks*, 1 Denio (N. Y.) 580. See, also, *Kimball v. Sattley*, 55 Vt. 285.

² *Rider v. Edgar*, 54 Cal. 127; *De Costa v. Comfort*, 80 Cal. 507. Otherwise if the statute provides that the mortgagee shall take possession of the grain when harvested. *Goodyear v. Williston*, 42 Cal. 11.

³ *Howe v. Clark*, 23 Ill. App. 145.

⁴ *Matthews v. Burke*, 32 Tex. 419; *Kennard v. Harvey*, 80 Ind. 37; *Finney v. Harding*, 32 Ill. App. 98.

⁵ *Keel v. Levy*, 24 Pac. Rep. 253. Compare *Waters v. Bank*, 65 Iowa 234.

⁶ *Muse v. Lehman*, 30 Kans. 514.

⁷ *Close v. Hodges* (Minn.), 46 N. W. Rep. 335.

⁸ *Philip Best Brewing Co. v. Pillsbury*, 5 Dak. 62. See, also, *Nichols v. Barnes*, 3 Dak. 148.

⁹ *Patrick v. Meserve*, 18 N. H. 300; *Gage v. Whittier*, 17 N. H. 312; *Pratt v. Maynard*, 116 Mass. 388.

be protected from suit in trover for the conversion.¹ So, when the mortgagor has authority to sell or exchange the property, the mortgagee is estopped to claim the property so disposed of.² If the purchaser surrenders the mortgaged property to the mortgagee on demand, he cannot replevy from the mortgagor chattels given in exchange.³

§ 714. **Implied Authority.**—Where a mortgagor is authorized and directed by the mortgagee to prepare a house for marketing the mortgaged crop, and in pursuance of such directions, and in order to obtain money for such purpose, sells cotton included in the mortgage to a person who ships it to a merchant, the mortgagee having received the benefit of the acts of the mortgagor, his agent, in selling the cotton, cannot maintain an action for conversion of such cotton.⁴

The mortgagor's authority to sell may be implied from his covenants to account to the mortgagee for the proceeds of sales,⁵ or from the general course of dealing of the parties.⁶

As to whether there was such an intent of the parties is a question for the jury.⁷

But authority to sell, given by the mortgagee, involving the exercise of judgment and discretion, cannot be delegated.⁸

§ 715. **Proof.**—Where, on action for the conversion of cotton claimed under a mortgage, there was conflicting evidence as to whether the cotton claimed was part of the mortgagor's crop, an instruction that it was incumbent on the mortgagee to satisfy the jury that the cotton in question was raised by the mortgagor, was proper.⁹

A mortgagee claimed possession of certain chattels under a mortgage. There was testimony that the mortgagor sold

¹ *Gage v. Whittier*, 17 N. H. 312.

² *Carter v. Fately*, 67 Ind. 427.

³ *Carter v. Fately*, 67 Ind. 427.

⁴ *Etheridge v. Hilliard*, 100 N. Car. 250.

⁵ *Abbott v. Goodwin*, 20 Me. 408.

⁶ *Pratt v. Maynard*, 116 Mass. 388.

⁷ *Jenckes v. Goffe*, 1 R. I. 511.

⁸ *Drum v. Harrison*, 83 Ala. 384.

⁹ *Woolsey v. Jones*, 84 Ala. 88.

them, after the mortgage debt was due, to a person who knew of the mortgage; that the purchaser inquired of the mortgagee as to the right of the mortgagor to sell, and he said: "I guess it is all right; I gave leave to sell her, provided he gave me a mortgage on a team as good as the one I sold him." Soon afterwards the mortgagor mortgaged the mortgagee another team. The waiver of the first mortgage and the taking of the second was denied by the mortgagee. Held, that the weight of evidence showed his waiver, and the mortgagee could not recover.¹

§ 716. **The Lien Follows the Goods.**—The general rule is, that the lien of the mortgagee follows the goods, and, although a chattel mortgage provides that, until condition broken, the mortgagor may remain in possession, if the chattels are sold on an execution against them, the mortgagee may recover them.²

Under the Code of Alabama,³ which makes it an offense fraudulently to remove property on which one has a lawful, valid claim, it is held to embrace a mortgage on crops not yet planted. The court says the mortgage in question was executed before the crops were planted, or could have been *in esse*; that the rule is now firmly settled in this State that an equitable lien is created by such conveyances where the thing mortgaged has a potential existence, by which is meant a present interest in property of which the thing sold or conveyed is the product, growth or increase, as opposed to a mere possibility or expectancy not coupled with such interest.⁴

In Iowa a lien follows the goods, when sold by the mortgagor, but does not attach itself to the purchase-money.⁵ In Oregon the lien of a chattel mortgage on growing crops

¹ Littlejohn v. Pearson, 23 Nebr. 192.

² Levi v. Legg, 23 S. Car. 282.

³ Code, § 4253.

⁴ Varnum v. State, 78 Ala. 28; Mayer v. Taylor, 69 Ala. 403; 44 Am. Rep. 522.

⁵ Waters v. Bank, 65 Iowa 234.

follows the grain after severance and removal, and the purchase-money after sale.¹

§ 717. **Conveying Mortgaged Property Without Giving Notice.**—If a mortgagor in possession mortgages the property to another without giving notice of the first mortgage, and gives the second mortgagee possession, he is guilty of conversion.² He may sell his equity of redemption or mortgage it, but he cannot handle the property as his own.³

§ 718. **Wrongful Seizure.**—In an action by a mortgagor against the mortgagee for an alleged peremptory and wrongful seizure taken by the latter, the value of the property should be assessed, subject to the liens thereto, and the mortgagor can only recover value of his interest or equity.⁴

A mortgagee of personal property who takes possession of the mortgaged property for breach of condition is not liable in trespass to the mortgagor for the mere fact that, in taking possession, he was accompanied by a constable or other officer, who had no writ or other process, if it does not appear that any force or threats were used, or that the agent having the property in charge made no objection, and if nothing was done *colore officii*.⁵

In an action of trespass on the case for unlawfully foreclosing a chattel mortgage, when the declaration alleges that the mortgagee not only took possession of the mortgagor's lumber-yard, where the mortgaged property was located, but wrongfully and maliciously, and to injure him, took charge of the entire business and premises, contrary to the mortgagor's will, and so held the same, entirely excluding him, and prevented his carrying on the business, damages for such wrongful holding should be allowed.⁶

In an action of trover by a purchaser of a mortgaged chat-

¹ Keel v. Levy (Oreg.), 24 Pac. Rep. 253.

² Millar v. Allen, 10 R. I. 49; Ashmead v. Kellogg, 23 Conn. 70.

³ Millar v. Allen, 10 R. I. 49.

⁴ Torp v. Gulseth, 37 Minn. 135.

⁵ Holloway v. Arnold, 92 Mo. 293.

⁶ Bearss v. Preston, 66 Mich. 11.

tel, against an assignee, for value of the mortgaged chattel, who had bought in the chattel at a defective foreclosure sale, the defendant, where judgment is given plaintiff for the value and hire of the chattel, is entitled, under an equitable plea, to set off against the judgment the value of the chattel.¹

§ 719. **Waiver of Mortgage.**—A sale of a chattel by the mortgagor, with the consent of the mortgagee, will convey a good title to the purchaser, even though such consent was not in writing, as provided by statute.²

If a mortgagee of a chattel orally authorizes the mortgagor to sell it, a sale by the latter passes title to the purchaser.³

Where a party who holds a chattel mortgage on certain property issues a distress warrant and causes his bailee to take possession of the property under the authority of the distress warrant, the possession thus acquired is clearly the possession of the landlord and mortgagee, and he does not thereby release any lien which he has upon the property by virtue of his chattel mortgage; the act is good as against the rights of all but third parties, whose interests had attached before the property was so taken, subjecting the same to the payment.⁴

§ 720. **Ordering Assignee to Sell—Must Bear the Expense Incurred.**—The mortgagee of chattels permitted the assignee under an assignment for the benefit of creditors, executed subsequent to the mortgage, to begin to sell, and then stopped him. Held, that the expense incurred in selling was chargeable to the mortgagee.⁵

¹ *Rogers v. Lawrence*, 79 Ga. 185.

² *Roberts v. Crawford*, 54 N. H. 532; *Gage v. Whittier*, 17 N. H. 312; *Patrick v. Meserve*, 18 N. H. 300.

³ *Pratt v. Maynard*, 116 Mass. 388; *Stafford v. Whitcomb*, 8 Allen (Mass.) 518.

⁴ *Atkins v. Byrnes*, 71 Ill. 327.

Under the rule of Illinois that the power of sale in the mortgagor makes the mortgage fraudulent, yet if the mortgagee knowingly permits the mortgagor to make sales in the ordinary course of business, he will be considered to have consented to such sales by implication and cannot object to it, as to third parties. *Ogden v. Stewart*, 29 Ill. 122; *Barnet v. Fergus*, 51 Ill. 352.

⁵ *Arnett v. Trimmer*, 43 N. J. Eq. 488.

§ 721. **Forfeiture Under Internal Revenue Laws.**—When the owner of personal property, mortgaged by him to another, is allowed to retain possession of it after giving the mortgage, and commits acts in respect of such property which work a forfeiture of it to the United States under the internal revenue laws,¹ it will be condemned, even though the mortgagee is not shown to have been concerned in such acts.

In this case it is said: "But if only the interest of the mortgagor be forfeited, how can anything more than his interest be sold; or if the court decrees a forfeiture of the *res*, and sells it as forfeited to the government, under what provision of law is the court authorized to pay the proceeds of sale to other parties than the government? It is clear that the court has no power to exempt a portion of the proceeds of the sale from the effect of the condemnation." The mortgagee must apply to the secretary of the treasury for satisfaction.²

§ 722. **Mortgagor's Power to Create Liens.**—The mortgagor of chattels has no right to pledge the mortgaged property to any person or otherwise to create a lien upon it to the prejudice of the mortgagee's rights.³

In a lease for a term of years it was stipulated that the furniture should not be removed while any of the rent was due, and should be security for the rent. The lease was not deposited as required by the law relating to chattel mortgages. Afterwards the lessee mortgaged the property for a pre-existing debt and delivered the property to the mortgagee, and the mortgage was filed. The mortgagee had no notice of the stipulation in the lease, and the court decided his lien superior to that of the lessor.⁴

Under the law of New Hampshire a mortgagor of horses cannot, without the knowledge and acquiescence of the mortgagee, express or implied, entrust the horses to be boarded,

¹ Acts of 1867, § 25; 14 U. S. Stat. at L. 483.

² United States v. Seven Barrels of Dist. Oil, 6 Blatchf. C. C. 174.

³ Bissell v. Pearce, 28 N. Y. 252.

⁴ Smith v. Worman, 19 Ohio St. 145. See, also, Lanphere v. Lowe, 3 Nebr. 131.

so as to subject them to the lien of their keeping,¹ because the title of the true owner cannot be divested without his own free will and consent.²

§ 723. **As Against an Execution.**—Where foreclosure proceedings were instituted before the expiration of the time named for payment of the debt, according to Utah law, the mortgagor to remain in possession, the mortgagee's lien will be superior to that obtained by a levy and execution made after the expiration of the time, and while the property still remains in the mortgagor's possession.³

§ 724. **Mortgagee's Becoming Administrator of the Mortgagor's Estate.**—In Pennsylvania the property in the hands of the decedent at the time of his death, for which he has executed, to one who afterwards becomes his administrator, a bill of sale as security for the payment of the debt, passes into the custody of the law for administration, and the holder of the bill of sale is entitled to no preferences over other creditors of the decedent.⁴ In this State possession on the part of the mortgagee is essential to the validity of his lien as against other creditors, where the subject of the mortgage is personal property capable of actual corporeal occupation; the death of the debtor gives the general creditors the right to deny the validity of such a mortgage when possession has not been taken in the mortgagor's lifetime. By the death of the mortgagor his personal estate in possession passes into the custody of the law for administration, and a mortgagee has no right to undertake to administer any part of it for the satisfaction of his own debt. Even if there is enough to satisfy all the creditors, he cannot decide the question, but must leave it to the proper court. If there is not enough, his mortgage without possession becomes void as to creditors by the death of his debtor, for then the law takes

¹ *Sargeant v. Usher*, 55 N. H. 287.

² *Kingsbury v. Smith*, 13 N. H. 109; *Farley v. Lincoln*, 51 N. H. 577; *Saltus v. Everett*, 20 Wend. (N. Y.) 267.

³ *Armstrong v. Broom* (Utah), 13 Pac. Rep. 364.

⁴ *Heft's Appeal* (Pa.), 9 Atl. Rep. 87.

hold of the estate for the benefit of all. If there is not enough he cannot suffer much by waiting the due course of administration.¹

This principle, that the pledgee must take immediate possession, does not apply in the case of a pledge of an intangible interest, incapable of delivery or manual occupancy of all; or in the case of an expectancy to come into existence after the contract to pledge is made, and when a personal effort of pledgor is necessary both to its subsequent existence and its actual maintenance.²

§ 725. **Secret Lien.**—A mortgage executed by a party in possession of the property as owner, although the legal title was not to pass to him until the chattel was paid for, where such contract of conditional sale is not filed for record, will take precedence over the secret lien of the party claiming to be the real owner of the property.³

§ 726. **Mortgaging Under an Assumed or Fictitious Name.**—If the true owner conveys property by any name, the conveyance as between the grantor and grantee will transfer the title.⁴ And when a mortgagor mortgages chattels under an assumed name, and then sells them to another party, the mortgagee can recover them.

Thus, a party bought personal property and gave back a mortgage under an assumed name. The mortgagee duly filed the mortgage and fully complied with the law. Afterwards the mortgagor sold the property under his right name to an innocent purchaser, who searched the records and found no incumbrance against the property. In an action of replevin against the purchaser by the mortgagee it was held that the latter could recover the property.⁵

§ 727. **Implied Authority to Create Lien.**—While a mort-

¹ *Kater v. Steinsuck*, 40 Pa. St. 501.

² *Collins' Appeal*, 107 Pa. St. 590.

³ *Manning v. Cunningham*, 21 Nebr. 288.

⁴ *Wilson v. White*, 84 Cal. 239; *Garwood v. Hastings*, 38 Cal. 222; *Andrews v. Dyer*, 81 Me. 104; *Hommel v. Devinney*, 39 Mich. 522; *Staak v. Sigelkow*, 12 Wis. 234; *Nixon v. Cobleigh*, 52 Ill. 387.

⁵ *Alexander v. Graves*, 25 Nebr. 453.

gagor is permitted to go on and finish an article that he has mortgaged, it does not give him a lien as against the mortgagee for work done by him thereon, when he has no right on his part to work in such a manner as to create a lien for such work.¹ In order to constitute such a lien the work must be done under agreement with the owner, or with some one authorized by him to make such an agreement.²

At common law, as well as by admiralty courts, it is held on general principles, independently of any provision of statutes, that liens for repairs, made by mechanics upon vessels in their possession, take precedence of prior creditors.³

On the same principle a hack mortgaged, to be run by the mortgagor, the person making the necessary repairs on it has a lien therefor as against the mortgagee, because it was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose.⁴

§ 728. **Statutory Liens.**—Where a farmer executes a mortgage on his crop, under Mississippi statute, for supplies to enable him to make the crop, and hires a laborer to assist him in making the crop, the laborer has a paramount lien, though his contract be verbal, and the mortgage be duly recorded. The laborer's lien is implied by law. It exists *in pais*. It requires no writing and rests upon no record to uphold it.⁵

So, in Arkansas, the mortgagee may, after the maturity of his rights under a mortgage, maintain trover against the owner of the land, who took possession of the crop and converted it for the rent. The mere ownership of land confers

¹ *Globe Works v. Wright*, 106 Mass. 207.

² *Hollingsworth v. Dow*, 19 Pick. (Mass.) 228.

³ *Williams v. Allsup*, 10 C. B. (N. S.) 417; *The Granite State*, 1 Sprague D. C. 277; *Donnell v. The Star Light*, 103 Mass. 227; *The Scio*, L. R., 1 Adm. & Eccl. 353; *The St. Joseph*, 1 Brown Adm. 202; *Beall v. White*, 94 U. S. 382.

⁴ *Hammond v. Danielson*, 126 Mass. 294.

⁵ *Buck v. Payne*, 52 Miss. 271.

no right to the possession and disposal of the crop raised on it by the tenant.¹

A lien of a mortgagee of chattels, whose mortgage is duly recorded, is prior to that of a landlord upon whose premises they may be afterwards used by the mortgagor as his tenant, although the mortgagee may have actual notice that such chattels were being used upon the premises.² A landlord who has a lien by statute, does not lose it by taking a mortgage and omitting to record it.³

In the absence of statutory provisions, a landlord has no lien upon the crops raised by his tenant, by virtue of ownership.⁴

§ 729. **Substitution.**—A chattel mortgage contained covenants that the mortgagor would not trade any of the property without written consent of the mortgagee, and that, in case he did, the property so obtained should be held and taken in place of that disposed of; it was held that the mortgagor could not be required to substitute like property for animals which had died or for articles used or consumed by him.⁵

Cotton subject to mortgage was exchanged for seed cotton, which was delivered to the mortgagee, and its proceeds credited on the amount secured by the mortgage. It was decided that the mortgagee could not, after having been advised of the transaction, reclaim the cotton without surrendering the seed cotton or accounting for its proceeds.⁶

§ 730. **Lien of Livery Stable Keepers and Agisters.**—Upon

¹ *Robinson v. Kruse*, 29 Ark. 575.

² *Jarchow v. Pickens*, 51 Iowa 381.

³ *Pitkin v. Fletcher*, 47 Iowa 53.

⁴ *Tison v. People's Sav. and Loan Ass'n*, 57 Ala. 323.

The case of *Finney v. Harding*, cited in Sections 711 and 712, was overruled by the Illinois Supreme Court, March 30th, 1891; but such decision does not change the doctrine enunciated in those sections.

A lien is not waived or lost by taking security not enforceable against third persons. If a landlord takes a chattel mortgage and does not record it as required by law, this does not waive his landlord's lien. *Pitkin v. Fletcher*, 47 Iowa 53.

⁵ *Hulsizer v. Opdyke* (N. J.), 13 At. Rep. 669.

⁶ *Hicks v. Ross*, 71 Tex. 358.

this question of which lien takes precedence, when the chattel mortgage is first executed, there is a conflict of authority. The weight of authority is in favor of the lien created by the chattel mortgage. Thus, a recorded chattel mortgage on a horse is superior to a subsequent lien of a livery stable keeper, acquired under the statute when the horse is placed in the stable, after the making and recording the mortgage, without the knowledge of the mortgagee, though the stable-keeper has no notice in fact of the mortgage. In this case the court, per Folkes, J., says: "Upon the question thus presented there is a conflict of opinion to be found in the books, while it has never been decided in this State. We are to ascertain which of the antagonistic views is more in keeping with sound principles, and the better sustained by authority. In arriving at the intention of the legislature in the passage of the act conferring the stable-keeper's lien, we should regard the object and policy of our legislature with reference to the registration laws. The mortgage, being registered, amounts in law to actual notice to all parties dealing with the property, as fully, to all intents and purposes, as if the fact were placarded on the property itself, so far as the rights of the mortgagee therein are concerned. To permit the mortgagor to incumber it to its full value, and consequent destruction to the mortgagee, is as fatal to the latter's rights, and defeats as effectually the policy of our registration laws, as if the former were allowed to sell it to a purchaser who was in fact ignorant of the mortgage. Nor are we able to appreciate any considerations of public policy which lead us to extend to the livery stable keeper any immunity from the fate of all who deal with property the title to which is matter of record with which they are not only chargeable with knowledge in law, but with which they can, through the registry laws, acquaint themselves in fact.

"This being so, it is not for the courts to give to the statutes in question any such effect, unless constrained to do so by the language or manifest intention of the legislature."

In speaking of the opposite reasoning of some other courts,

the judge says: "But their reasoning does not commend them to us sufficiently to shake our convictions that the other view is the sounder and better. Nor do we think that the rule which prevails with reference to railroad mortgages, that claims for fuel, rails, cross-ties, labor and repairs have precedence over such mortgage, furnishes any analogy to the case at bar. They rest upon the principle or presumption of implied agency in the company to construct such liabilities, and discharge them out of the earnings of the mortgaged property, as contemplated by the mortgagee, and necessary to the operation and preservation of the property."¹

So, the fact that mortgagees allow cattle to remain with a party other than the mortgagor, after learning that they had been placed in his care by the mortgagor, does not render their lien subordinate to that of the keeper for feeding the cattle, as created by statute. In order to maintain a lien for keeping the cattle, the party must show that the cattle were placed in his hands by the consent of the mortgagees. Boyce, C. J., says: "The title to the property was in the mortgagees at the time it was placed by the mortgagor in charge of the defendant; and, to maintain a lien under the statute, the latter should be required to show that the property was brought to his premises or placed in his care by or with the consent of the owner. It is contended that such consent should be inferred from the fact that plaintiffs allowed the stock to remain in defendant's care and keeping after learning that it had been placed there by the mortgagor. It is possible that such consent might be inferred from this fact, as would constitute the basis of a personal claim against them for the price of such keeping; but to say that it should operate to create the statutory lien, to the impairment of the mortgage security, would be to give the statute a forced and liberal, not by any means a strict, construction. * * *

The mortgagees cannot be held to have consented, from the

¹ *McGhee v. Edwards*, 87 Tenn. 506; and see *Jackson v. Kasseall*, 30 Hun (N. Y.) 281; *Bissell v. Pearce*, 28 N. Y. 252; *Charles v. Neigelsen*, 15 Ill. App. 17; *Sargent v. Usher*, 55 N. H. 287; *Bank v. Lowe*, 22 Nebr. 68.

circumstances of the transaction, to the stock being put in the charge of the defendant or anybody else, to be wintered, and defendant has no lien, as against the plaintiffs."¹

But the circumstances may be such as to indicate the mortgagee's consent to the action of the mortgagor in placing the property in the keeping of a third party, in which case the lien will be established. An implied agency may arise out of the terms upon which the mortgagor was left in possession, which will authorize the mortgagor to contract with a mechanic for repairs of a hack, a lien that would, in the particular case, be superior to the claim of the mortgagee.²

On this question Knowlton, J., says: "It is not contended that the plaintiff expressly agreed to the horses being placed in the defendant's care. But undoubtedly an implied consent will answer the requirements of the law; and in every case of this kind the inquiry is whether such implied consent is found. That depends, when animals are left with a mortgagor by a mortgagee, not only upon the terms of the express contract relating to them, but also upon all the circumstances surrounding the transaction, including the expectation of the mortgagee as to the management of them by the mortgagor. If, from these, the mortgagee may be presumed to have understood that the mortgagor would take them to a stable-keeper to be boarded, and no objection was made, such consent should be implied. Otherwise it should not. It should be kept in mind that the purpose of a mortgage is to furnish security, and that the property is usually left with the mortgagor for his convenience, with an understanding that nothing shall be done or permitted by him to impair the security. An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgagee without cogent evidence. A mortgage of horses, given to secure performance of an act in the distant future, is worthless if the mortgagor may create a lien upon them by putting them out to be boarded. It is true

¹ *Ingalls v. Vance*, 61 Vt. 582; *Hanch v. Ripley* (Ind.), 26 N. E. Rep. 70.

² *Hammond v. Danielson*, 126 Mass. 294.

the mortgagee must know they are to be fed and that it will cost something to feed them ; but that in itself is immaterial. The real question is whether he has reason to believe, and does believe, that they are to be boarded at a livery stable or kept by anyone else than the mortgagor.¹

§ 731. **Contrary Doctrine.**—The doctrine as stated in the last section is in accord with the current of authority, but there is an antagonistic view of great weight. A notable case was decided by the Kansas Supreme Court under the following facts: A mortgagor, after making a chattel mortgage on some cattle, of which he was to retain possession, and “take care of at his proper cost and expense,” then turned the cattle over to a third party to winter, and agreed to pay him for such wintering. The mortgagor never paid for this expense of wintering. The mortgagor had placed the cattle with the agister without the consent or knowledge of the mortgagee. It was decided that the agister had a lien on the cattle for his reasonable charges, which was paramount to the lien of the mortgage. Brewer, J., gave the opinion of the court and said: “The lien of the mortgage was prior in time, was created by contract, while that of the agister, later in time, arises out of the statute. Though the amount in controversy is small, yet the question is of some importance. It affects a great many of the smaller transactions of business. A buggy is taken to a shop for repairs; a horse is driven to a livery stable and left over night; a traveler brings his trunk and stops at a hotel; in all these cases a lien is given by statute. Suppose a prior chattel mortgage exists; must the statutory lien give way to the prior contract lien? Must a mechanic, a livery stable or hotel-keeper always examine the register’s office to see whether there be a chattel mortgage upon the property before receiving it for repairs or keeping? * * * The express stipulation in the mortgage that the keeping of the mortgaged property should be at the expense of the mort-

¹ *Howes v. Newcomb*, 146 Mass. 76; *Easter v. Goynes*, 51 Ark. 222.

gagor is no more than the law would imply, in the absence of any express agreement. The mortgagor, retaining possession, must, of course, pay the expenses of the keeping. He is not simply an agent of the mortgagee. He can make no contract on behalf of, or which will create any liability against the mortgagee; he acts on his own behalf. He is the owner, with the duties of owner and the powers of owner, except as limited by the restrictions of the mortgage. Unless the mortgagee, by express contract, assumes the expense of the keeping of the property, it rests upon him.

“Now, the lien of the agister is not the mere creature of contract; it is created by statute from the fact of the keeping of the cattle. The possession of the agister was rightful, and the possession being rightful, the keeping gave rise to the lien; and such keeping was as much for the interest of the mortgagee as the mortgagor. The cattle were kept alive thereby; and the principle seems to be that where the mortgagee does not take the possession, but leaves it with the mortgagor, he thereby assents to the creation of a statutory lien for any expenditure reasonably necessary for the preservation or ordinary repair of the thing mortgaged. Such indebtedness really inures to his benefit. The entire value of his mortgage may rest upon the creation of such indebtedness and lien, as in the case at bar, where the thing mortgaged is live stock, and the lien for feed.”¹

So, in Minnesota, a person who keeps horses at the request of the owner or lawful possessor takes preference of a chattel mortgage executed before such keeping. This rule applies against a mortgagee in a case in which the request for keeping is made by the mortgagor, who was in lawful possession of the horses kept. Berry, J., says:

“A mortgagee, when he takes a mortgage, takes it, in legal contemplation, with full knowledge of and subject to the right of a person keeping the property at the request of the

¹Case *v. Allen*, 21 Kans. 217; *Vose v. Whitney*, 7 Mont. 385.

mortgagor or other lawful possessor to the statutory lien, as he would do to a common-law lien.”¹

§ 732. **A Mortgagor Cannot Set Up Title in Another.**—The mortgagor cannot defeat the mortgagee’s title by setting up title in a third person; neither can a purchaser from the mortgagor defeat the mortgagee’s title²—that is, by setting up an older mortgage with which he does not connect himself. In trover, when there is nothing in the relation of the parties to prevent it, it is a good defense to the action that the mortgagee has no title to the property sued for. It is necessary to the maintenance of this action that the plaintiff proves property in himself, general or specific, and a right to immediate possession; a disproof of this by the subsequent purchaser is not only, as a general rule, admissible, but it defeats the action. It may generally be proved by showing title in a stranger, called *jus tertii*.³

When, however, as in a suit by the mortgagee against one who has only the title and authority of the mortgagor, conferred after the mortgage was executed, the rule is different. He cannot depend on the outstanding title of a stranger, unless he connects himself with such outstanding title.⁴

So, in an action of replevin by the mortgagee of goods, against the mortgagor, it is no defense that the goods are subject to a prior mortgage, if the prior mortgage provides that the mortgagor may retain possession until breach of condition, and there is no evidence that the prior mortgagee has made any claim upon the mortgagor.⁵

¹Smith v. Stevens, 36 Minn. 303. See, also, Colquitt v. Kirkman, 47 Ga. 555; Brown v. Holmes, 13 Kans. 492.

A party who had taken a horse and held it by wrongful possession, took it to a livery stable and left it, and it was held that a lien existed in favor of the livery stable keeper against the owner. Johnson v. Hill, 3 Starkie 172.

²Thompson v. Spittle, 102 Mass. 207; Marks v. Robinson, 82 Ala. 69; Denby v. Mellgrew, 58 Ala. 147; Comer v. Sheehan, 74 Ala. 452; Burrows v. Waddell, 52 Iowa 195.

³Dermott v. Wallach, 1 Black (U. S.) 96; Dickinson v. Lovell, 35 N. H. 9; Leake v. Loveday, 4 M. & Gran. 972.

⁴Denby v. Mellgrew, 58 Ala. 147; Harker v. Danent, 52 Am. Dec. 670.

⁵Adams v. Wildes, 107 Mass. 123.

§ 733. **Purchase-Money.**—A judgment creditor bought a chattel and executed a mortgage for the price, which, on non-payment, was foreclosed. The proceeds were claimed by a judgment creditor under a *fiери facias* issued a year before. It was decided that the proceeds were subject to the mortgagee's claim, rather than to the judgment, as the chattel was still subject to the mortgage.¹

§ 734. **Vendor's Lien.**—A mortgagee takes the title unaffected by any lien of the vendor for the purchase-money, of which there is no notice, unless such is evidenced by writing, acknowledged and recorded, under the Iowa law.²

If the mortgagee purchases the entire interest of the mortgagor, then the entire title vests in him.³

§ 735. **Selling the Property by the Mortgagor—Giving New Mortgage.**—When the mortgagor sells the mortgaged property left in his possession, and afterwards gives to his mortgagee a second mortgage on other property in lieu thereof, the second mortgage is a sufficient consideration for the surrender of the first lien, and constitutes the second a valid contract. Judge Stone says that if the mortgagee accepted the second security, it was a sufficient consideration for the surrender of his first lien of the property sold, and constituted a second valid substitutionary contract, healing the breach of the first.⁴

§ 736. **Duration of Lien.**—A chattel mortgage given by a landlord to his tenant, in Illinois, and containing a provision that the note secured is extended two years from maturity on condition that the rent of the leased land shall be applied to pay interest and principal of the note, so long as any portion remains unpaid, does not create a lien on the land, nor give the mortgagee the right to retain rents after the expiration of the two years.⁵

¹ *Rasin v. Swann*, 79 Ga. 703. See, also, *Scott v. Warren*, 21 Ga. 408.

² *Manny v. Woods*, 33 Iowa 265.

³ *Colton v. Colton*, 3 Phil. (Pa.) 24; *Klock v. Cronkhite*, 1 Hill (N. Y.) 107; *Shaver v. Williams*, 87 Ill. 469.

⁴ *Cobb v. Malone*, 86 Ala. 571.

⁵ *Bowen v. McCarthy*, 127 Ill. 17.

ARTICLE III.—RIGHTS OF SUBSEQUENT MORTGAGEES.

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744. Second Mortgagee's Right of Action.

745. Assumption of Prior Mortgage.

§ 737. **The Same as a Purchaser.**—A person taking a second chattel mortgage upon property before the maturity of a prior mortgage, stands substantially in the same position as a purchaser, and should be governed by the same principles;¹ and, although the mortgagor obtains possession of the goods by means of fraudulent representations, his mortgagee, without notice, in Illinois, is not affected by it.²

§ 738. **His Title.**—A second mortgagee takes his mortgage subject to all the existing rights of the prior mortgagee;³ he must hold in subordination to the prior conveyance.⁴

§ 739. **His Rights to the Property.**—The second mortgagee has the right to redeem the property from the sale of the first mortgagee;⁵ and a mortgage subject to a prior mortgage conveys only the right to redeem the property, though recorded first.⁶

§ 740. **Continuation of the Right.**—The right of the second mortgagee to redeem the mortgaged property continues until the foreclosure of the first mortgage, unless defeated by the goods being taken and sold by a third party.⁷

§ 741. **Selling the Property.**—A second mortgagee who

¹ *Cunningham v. Nelson Man. Co.*, 17 Ill. App. 510; *Arnold v. Stock*, 81 Ill. 407.

² *Kranert v. Simon*, 65 Ill. 344.

³ *Schoenberger v. Mount*, 1 Handy (Ohio) 566.

⁴ *Norman v. Craft*, 90 N. Car. 211; *Smith v. Smith*, 24 Me. 555.

⁵ *Howard v. Chase*, 104 Mass. 249; *Tuite v. Stevens*, 98 Mass. 305.

⁶ *Pecker v. Silsby*, 123 Mass. 108.

⁷ *Treat v. Gilmore*, 49 Me. 34.

takes the property from the possession of the mortgagor, and sells it and receives the full consideration of the sale without regard to the rights of the senior mortgagee, is liable to the latter in an action for the conversion of the property.¹ But if the second mortgagee sells the property with the consent of the first mortgagee, the latter cannot maintain an action against him for conversion, although such consent is given under a mistaken impression as to the respective rights to the proceeds. The consent operates as a waiver of the first mortgagee's rights to the property.²

§ 742. **Second Mortgagee in Possession—Replevin by First Mortgagee.**—The first mortgagee of chattels who had the right to their immediate and exclusive possession, took them on a replevin writ from the second mortgagee in possession. The second mortgagee, by way of defense, set up equities, and, moreover, equities which had arisen since the commencement of the suit; it was held that such a defense could not avail him, his remedy being by a suit in equity to redeem.³

§ 743. **First Mortgagee Can Waive His Rights.**—The first mortgagee can waive his right to the property and let a second party in on the same footing as himself,⁴ so that, in taking possession on default, they become tenants in common of the goods therein specified, and the two instruments become of the same legal effect as if they had been executed at the same time; the mortgagees become, after default and taking possession, tenants in common of the security to the property therein specified.⁵

§ 744. **Second Mortgagee's Right of Action.**—A second mortgagee of personal property, who is not in possession, cannot maintain an action in the nature of trover for its

¹ *Lowe v. Wing*, 56 Wis. 31.

² *Anderson v. Case*, 28 Wis. 505.

³ *Roberts v. White*, 146 Mass. 256.

⁴ *Densmore v. Mathews*, 58 Mich. 616.

⁵ *Howard v. Chase*, 104 Mass. 250; *Welch v. Sackett*, 12 Wis. 243; *Phillips v. Cummings*, 11 Cush. (Mass.) 469; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120.

conversion.¹ If his mortgage declares that he may, at any time, take possession of the property, he is entitled to possession as against all the world, except the first mortgagee, whose debt remains unpaid, and may maintain an action for any taking of it which is not in pursuance of the first mortgage but in defense of his rights.²

§ 745. **Assumption of Prior Mortgage.**—An agreement in a second chattel mortgage, by the mortgagee, to secure to the first mortgagee the payment of his lien, and to charge the account to the mortgagor—the amount of the said lien—and out of the first moneys which may be passed to his credit, from any source whatever, to set aside the said amount as an indemnity against the first mortgage, is not such a contract as will support a judgment against the second mortgagee for the amount of the first mortgage.³

ARTICLE IV.—CONFUSION OR INTERMINGLING OF GOODS.

- 746. General Rule.
- 747. Burden of Distinguishing.
- 748. Right of Action.
- 749. New Goods.
- 750. Under a Lease.
- 751. As to Logs.
- 752. Maryland Doctrine.

§ 746. **General Rule.**—The general rule that he who produces the confusion of goods shall lose his own, is carried no further than necessity requires, and applies only to cases where it is impossible to distinguish what belongs to one from what belongs to another. When the articles can be easily distinguished and separated, no change of property

¹ *Ring v. Neale*, 114 Mass. 111; *Landon v. Emmons*, 97 Mass. 37; *Rugg v. Barnes*, 2 Cush. (Mass.) 591; *Clapp v. Campbell*, 124 Mass. 50; *Goodrich v. Willard*, 2 Gray (Mass.) 204.

² *Newman v. Tymeson*, 18 Wis. 172. See, also, *Hume v. Breck*, 4 Litt. (Ky.) 285.

³ *Clapp v. Halliday*, 48 Ark. 258.

takes place, but the burden is on the guilty party to distinguish his property or lose it.¹

So, it is held that if the mortgagor of goods who is entrusted with their possession, intermixes them purposely, or through want of care, with his own goods, so that they cannot be distinguished, and consigns them for sale to a third party, who sells them, the mortgagee is entitled to recover from the consignee the value of the whole.²

If the intermingled goods can be easily distinguished and separated no change of property takes place, and each party may claim his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of mixture of corn, coffee, tea, wine, or other articles of the same kind and quality, then each may claim his aliquot part; but if the mixture is indistinguishable because a new ingredient is formed not capable of a just appreciation and division according to the original rights of each, or if the articles mixed are of different values or quantities, and the original values or quantities cannot be determined, the party who occasions or through whose fault or neglect occurs the wrongful mixture must bear the whole loss.³

§ 747. **Burden of Distinguishing.**—Where the goods of the mortgagee are intermixed with like goods of the mortgagor, the burden of proof is on the vendor of the new goods sold the latter, to designate his goods, because, in selling goods to the mortgagor with knowledge that he would probably intermix them with those he had already mortgaged, makes

¹ *Queen v. Wernwag*, 97 N. Car. 383.

² *Williard v. Rice*, 11 Met. (Mass.) 493; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 108. See, also, *Dunning v. Stearns*, 9 Barb. (N. Y.) 630; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 383; *Hasseltine v. Stockwell*, 30 Me. 237; *Schulenberg v. Harriman*, 2 Dill. 398; *Eldred v. Oconto*, 33 Wis. 133.

³ *Robinson v. Holt*, 39 N. H. 557. See, also, *Lupton v. White*, 15 Ves. 432; *Bond v. Ward*, 7 Mass. 123; *Shumway v. Rutter*, 8 Pick. (Mass.) 443; *Armory v. Dalmire*, 1 Str. 505; *Panton v. Panton*, 15 Ves. 439; *Gilman v. Hill*, 36 N. H. 311.

the vendor guilty of laches and the indistinguishable goods become the property of the mortgagee.¹ The guilty party has the burden of proof to distinguish it or lose it.²

§ 748. **Right of Action.**—If the mortgagor confuses the mortgaged goods with his own so that they cannot be separated by the mortgagee, and refuses to distinguish them himself, the mortgagee may take the goods without becoming a trespasser.³

So, the mortgagee may replevy the goods in the hands of a purchaser upon failure to identify the specific articles not mortgaged.⁴

§ 749. **New Goods.**—Where a mortgagor, having added new purchases to the mortgaged stock, refuses on demand to identify and separate the new goods from the old, when the mortgagee has rightfully taken possession, though there be no such confusion of goods as to absolutely destroy their separate identity, yet, if they could not be separated without the mortgagor's aid, the sole mischief would thereby be produced by the confusion of the goods, and the mortgagee can take the whole amount.⁵

§ 750. **Under a Lease.**—A lessee of a mill, whose lease includes a commissary store attached to the mill, is not bound to keep the original stock of goods contained in the store when he took the lease, distinct from subsequent additions made by him, and does not lose any rights by intermingling the two.⁶

§ 751. **As to Logs.**—A mortgagor, by indiscriminately mixing logs cut afterwards with those mortgaged, cannot defeat the mortgagee's claim.⁷

§ 752. **Maryland Doctrine.**—A mortgage of a stock of

¹ *Kreth v. Rogers*, 101 N. Car. 263.

² *Queen v. Wernwag*, 97 N. Car. 383.

³ *Fuller v. Paige*, 26 Ill. 358.

⁴ *Adams v. Wildes*, 107 Mass. 123; *Kreuzer v. Cooney*, 45 Md. 582.

⁵ *People v. Bristol*, 35 Mich. 28; *Stephenson v. Little*, 10 Mich. 433; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; *Robinson v. Holt*, 39 N. H. 557.

⁶ *Liberty Co. Land and L. Co. v. Barnes*, 77 Ga. 748.

⁷ *Jenkins v. Steanka*, 19 Wis. 126; *Mowry v. White*, 21 Wis. 417.

goods containing a stipulation embracing after-acquired goods, is ineffectual at law to convey the after-acquired goods, which are subject to seizure upon execution by a judgment creditor of the mortgagor. Under such a mortgage, where property is commingled with subsequently-acquired goods by the mortgagor, it is presumed to be done with the mortgagee's permission, and if it be so intermingled as to prevent separation or identification, the rights of third parties cannot be affected thereby.¹

ARTICLE V.—RIGHTS OF BONA FIDE PURCHASERS.

- 753. Purchasers in Good Faith.
- 754. Purchasing With Notice.
- 755. Not a *bona fide* Purchaser.
- 756. Sale Subject to Prior Mortgage—Rights of Purchaser.
- 757. Return of Note and Mortgage.
- 758. When Purchaser Cannot Set up Defect in the Mortgage.
- 759. Cannot Set up Usury.
- 760. What the Purchaser May Show in Defense.
- 761. Sale With Oral Consent of Mortgagee.
- 762. Estoppel of Purchaser.
- 763. Conversion by Purchaser.
- 764. Measure of Damages for Conversion of Property.
- 765. Buying at Auction Sale—Liability.
- 766. Right of Action by Mortgagee.

§ 753. **Purchasers in Good Faith.**—One who purchases personal property in good faith for value, of the general owner in possession, without notice, actual or constructive, that it is incumbered, will hold it discharged of any prior liens.²

Thus, when a party without notice purchases at an execution sale property subject to an unrecorded mortgage, his title will be protected.³ And a creditor who receives goods in payment of his debt is a purchaser in good faith within the purview of the New York statute,⁴ which declares that an unfiled chattel mortgage is void as against subsequent purchasers in good faith.⁵

¹Hamilton v. Rogers, 8 Md. 301.

²Andrews v. Jenkins, 39 Wis. 476.

³McKnight v. Gordon, 13 Rich. Eq. (S. Car.) 222.

⁴4 Rev. Stat. (8th ed.) 2508.

⁵Button v. Rathbone, 118 N. Y. 666.

§ 754. **Purchasing With Notice.**—A purchaser from a mortgagor, with notice of the incumbrance, has only the rights of the mortgagor. The mortgagee in possession is not a naked depositary, but has possession coupled with an interest, and his damage by an unlawful conversion of the property is to the extent of his interest; he can recover for such conversion against a mortgagor or his vendee.¹ And a chattel mortgage, filed or registered as required by law, is constructive notice to the purchaser of the mortgaged property of the mortgagee's lien, though a search of the office, timely made, failed to disclose the existence of the mortgage.²

§ 755. **Not a Bona Fide Purchaser.**—One who has converted the mortgaged property and has acquired title by payment of a judgment for the value of the property, obtained against him by the mortgagor or his assigns, because of the conversion, is not a *bona fide* purchaser, within the meaning of the statute of New York.³

When one buys at a voluntary sale from his debtor and pays no money, but merely credits the amount on the purchase-money upon a pre-existing debt, he is not a *bona fide* purchaser for value, within the meaning of the Chattel Mortgage act of Texas.⁴

§ 756. **Sale Subject to Prior Mortgage—Rights of Purchaser.**—If the owner of chattels which he has mortgaged sells the same subject to the mortgage, and the purchaser recovers their value in an action against the sheriff, who has levied upon and sold the same under execution against the mortgagor, such purchaser, as against the mortgagee, cannot retain any more of the proceeds of his recovery than the excess from the same due on the mortgage. Such judgment against the sheriff for the full value of the property is conclusive that such execution creditor has no right to hold any

¹ McCandless v. Moore, 50 Mo. 511; Hall v. Sampson, 35 N. Y. 274; Hathaway v. Brayman, 42 N. Y. 322.

² Kribbs v. Alford, 120 N. Y. 519.

³ Marsden v. Cornell, 62 N. Y. 215.

⁴ Overstreet v. Manning, 67 Tex. 657.

portion of the mortgaged property by virtue of his execution.¹

§ 757. **Return of Note and Mortgage.**—Where a mortgagor turned over to the mortgagee cotton sufficient to pay the debt, and received from him the mortgage and note, and sold the property mortgaged to a third party, to whom he showed the note and mortgage, and stated it had been paid, such vendee is protected, though the cotton turned over to the mortgagee was taken from him by one holding a prior lien, and the mortgage was not satisfied on the record.²

§ 758. **When Purchaser Cannot Set Up Defect in the Mortgage.**—A chattel mortgage was executed by the president of a certain company without the knowledge of the directors. The property was subsequently purchased by a second company, who assumed the debt. The purchaser could not set up any invalidity of the inception of the mortgage as against the mortgagee.³

So, when a subsequent purchaser has purchased mortgaged property, assuming the payment of the debt, he cannot, in a proceeding to foreclose, object to the mortgage on the ground of an alleged defect in manner of execution, when the mortgagor does not interpose any objection upon that ground.⁴

§ 759. **Cannot Set Up Usury.**—A purchaser of mortgaged property cannot set up usury in a proceeding to foreclose the mortgage,⁵ because the defense of usury is personal to the mortgagor, his heirs and representatives.⁶ Neither can a junior mortgagee avail himself of the usury in the consideration of a prior mortgage.⁷

§ 760. **What the Purchaser May Show in Defense.**—But a

¹ *Magill v. Dewitt Co. Sav. Bank*, 126 Ill. 244.

² *Wilkinson v. Solomon*, 83 Ala. 438.

³ *Dwight v. Scranton and W. Lum. Co.*, 69 Mich. 127.

⁴ *Greither v. Alexander*, 15 Iowa 470.

⁵ *Perry v. Kearns*, 13 Iowa 174; *Powell v. Hunt*, 11 Iowa 430.

⁶ *Stephens v. Muir*, 8 Ind. 352; *Campbell v. Johnston*, 4 Dana (Ky.) 177.

⁷ *Powell v. Hunt*, 11 Iowa 430.

purchaser of mortgaged property may show that the prior debt has been paid,¹ or that it is absolutely void, so that the mortgagee could not enforce it, although the mortgagor was willing to make it good.²

§ 761. **Sale With Oral Consent of Mortgagee.**—A sale of mortgaged property by the mortgagor, with oral consent of the mortgagee, will convey a good title to the purchaser, although the latter was not informed of the existence of the mortgage at the time of the sale.³

§ 762. **Estoppel of Purchaser.**—Where a chattel is advertised for sale and sold, subject to a mortgage, the purchaser has a sufficient notice of the mortgage to estop him from contesting it on the ground that it was not duly placed on file.⁴

§ 763. **Conversion by Purchaser.**—A purchaser who buys mortgaged property and sells or consumes it, is personally liable to the mortgagee for the damages incurred, even if he contends that the mortgage is invalid, and that he has a lien superior to the mortgagee's, and had constructive or actual notice under the New York law.⁵

The renewal affidavit can only be material in case of subsequent purchasers or mortgagees in good faith. But in many jurisdictions there are no subsequent purchasers, and subsequent mortgagees in good faith, when they have actual notice of a mortgage;⁶ and complying with the statute in filing the renewal certificate, is not necessary as to intermediate purchasers or mortgagees—that is, purchasers or mortgagees who purchase or whose mortgages were taken intermediate to the time of filing such mortgage and the end of the year during which it remained in force without renewal affidavit—but means only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year, and

¹ *Barry v. Bennett*, 7 Met. (Mass.) 354.

² *Housatonic and Lee Bank v. Martin*, 1 Met. (Mass.) 294.

³ *Stafford v. Whitcomb*, 8 Allen (Mass.) 518.

⁴ *Kellogg v. Secord*, 42 Mich. 818.

⁵ *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396.

⁶ *Gregory v. Thomas*, 20 Wend. (N. Y.) 17.

after it became necessary to file a renewal affidavit to continue the mortgage in force. He who purchases after the statutory time has expired during which a mortgage remained in force, has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not released on the record, and is not liable to the mortgagee for conversion or other action. But he who purchases before the time expires takes with notice of the mortgage and the rights of the mortgagee under the same.¹ "Subsequent" means after the time when the mortgage ought to be again filed to preserve its validity.²

The omission to refile a chattel mortgage, pursuant to the statute, does not render it invalid against purchasers or mortgagees intermediate the original filing and the ending of the year. "Subsequent" means after the expiration of the time—that is, after the time of refiling has elapsed.³

If property covered by a chattel mortgage, properly filed, is taken and converted within the year after the filing to give the mortgagee a good cause of action for such taking, it is not necessary, to preserve his right to recover, that the action should be commenced within the year from such filing, or that the mortgage should be renewed at the end of the year.⁴ The Wisconsin court, as to the construction of the renewal of chattel mortgages, follows the rule of the New York courts and holds that the clear intent, in case of failure to make the affidavit, is that the mortgage should cease to be valid as against creditors who should thereafter seize the property, or purchasers who should thereafter purchase it.⁵

In a case in Minnesota more than one year elapsed between the filing of the mortgage and the commencement of the action to recover for the conversion, and no copy and statement having been filed as provided for in the statute, it was insisted that the mortgagee could not recover, because

¹ Howard v. Nat. Bank (Kans.), 24 Pac. Rep. 983.

² Meech v. Patchin, 14 N. Y. 71.

³ Dillingham v. Bolt, 37 N. Y. 198.

⁴ Newman v. Tymeson, 12 Wis. 448; Case v. Conroe, 13 Wis. 498.

⁵ Lowe v. Wing, 56 Wis. 33; Frank v. Playter, 73 Mo. 672.

the mortgage was not, as against the attaching creditors, in life at the time of the commencement of the action; in other words, because the mortgagee had ceased to have any rights under the mortgage, as against such attaching creditors. But the court held that this position could not be sustained. "The goods were taken and sold by the defendant before the expiration of one year from the filing of the mortgage. Whether, since the conversion, he has kept his mortgage on foot by complying with the statute, is unimportant."¹

On setting aside a chattel mortgage, the fraudulent purchaser should be charged only with that he receives or that which, with reasonable diligence, he might have received for the property that actually came to his hands.²

And when a chattel mortgage is duly recorded, a purchaser of the mortgaged property is guilty of conversion, though he bought and removed it in good faith, and it was destroyed without his fault or negligence. Thus, a subsequent purchaser bought of the mortgagor property mortgaged, and carried it into another county, where it was consumed by fire, without the negligence of the purchaser; held, that he was guilty of conversion.³

§ 764. Measure of Damages for Conversion of the Property.—In trover by the mortgagee of property against one who purchases it of the mortgagor after it was mortgaged and sold to a third party, the damages are the value of the property and interest thereon from the time of the sale by the mortgagor, and not from the time of the purchase by the second vendee.⁴

§ 765. Buying at Auction Sale—Liability.—An announcement at an auction sale of personal property that the property was subject to a chattel mortgage, and that the purchaser will have to comply with the conditions, does not impose a

¹ *Edson v. Newell*, 14 Minn. 228.

² *Hurd v. Ascherman*, 117 Ill. 504.

³ *Ross v. Menefee* (Ind.), 25 N. E. Rep. 545. See *Campodonico v. Oregon Imp. Co.* (Cal.), 25 Pac. Rep. 763.

⁴ *Barry v. Bennett*, 7 Met. (Mass.) 354.

personal obligation upon the purchaser who hears and assents to the announcement. An action cannot be maintained against him to recover the amount secured by the mortgage, because he came under no contract of any nature whatever by consenting to or hearing such announcement.¹

§ 766. **Right of Action by Mortgagee.**—In New York a mortgagee of chattels cannot recover, in an action for an alleged conversion against a purchaser, from the mortgagor in possession, when such purchaser has sold and delivered the property to another person before default in payment of the mortgage, and before demand of possession by the mortgagee, although such mortgagee is empowered by the terms of the mortgage, which is duly filed, to take possession of the property at any time he deemed himself unsafe.²

The interest of the mortgagor may be levied on and sold by the officer without reference to the mortgage, and the remedy of the mortgagee in such case is to follow the property and recover it from the purchaser, or compel him to pay the mortgage debt.³

¹ *Hamill v. Gillespie*, 48 N. Y. 556.

² *Hathaway v. Brayman*, 42 N. Y. 322.

³ *Hall v. Sampson*, 35 N. Y. 277; *Hull v. Carnley*, 11 N. Y. 501.

CHAPTER XV.

ASSIGNMENT OF MORTGAGE.

ARTICLE I.—THE ASSIGNMENT—REQUISITES OF.

- 767. Effects of Assignment.
- 768. An Assignment Need Not be Recorded.
- 769. The Assignment Needs No Seal.
- 770. Payment by Creditor—Equitable Assignment.
- 771. After Tender—Right of Mortgagee.
- 772. Revesting Title.
- 773. Assignment of Mortgage Without the Debt.
- 774. Warranty of Title to the Mortgaged Property Cannot be Implied.

§ 767. **Effect of Assignment.**—The assignment of a note and the chattel mortgage securing it, by the mortgagee, *prima facie* transfers his interest in the property mortgaged to the assignee. If the mortgagee was in possession of the property, his assignment is legally the same as if he had sold and delivered the property to the assignee. The rights of the assignee are to be wrought out through the mortgagee. “A chattel mortgage in the usual form conveys to the mortgagee the property mortgaged, and he thereby becomes the general owner of it, and in the absence of a reservation of the right of possession in the mortgagor, he is entitled to the immediate possession of it. If there be such a reservation in favor of the mortgagor, such reservation only affects the possession according to the terms of the reservation, the title to the property remaining in the meantime in the mortgagee, who becomes entitled to the immediate possession on breach of the condition;” that the effect of assigning the note and mortgage securing it by the mortgagee, to the assignee, is a transfer by the former of his entire interest in the property mortgaged to the latter, who thereby, *prima facie*, becomes entitled to all the rights of the mortgagee under the mortgage, which are those of a general owner, en-

titled to the immediate possession of the property. In other words, the legal effect of the assignment is the same as if the mortgagee had been in possession of the property mortgaged and had sold and delivered it.¹

But before the assignee becomes entitled to the immediate possession the debt must be due, or the mortgagor must have broken the conditions set forth in the mortgage, when he is allowed to retain possession of the property.²

A recital in a chattel mortgage that there is due on the property in question a certain amount, which the mortgagor assumes and agrees to pay, is not constructive notice to an assignee of the mortgage of a lien for the purchase-price; it being found as a fact that the assignee took the mortgage in good faith, without knowledge or notice of the lien.

The court, per Allen, J., said: "Whether a man in the exercise of ordinary care and diligence, under the same circumstances, would have made the inquiry and learned of the existence of the lien, is a question of fact; it is not found in the case that the plaintiff was charged with the duty of making the inquiry, or that he was in any fault or negligence in making it. The finding that he took the mortgage in good faith, without knowledge or notice of the defendant's lien, is a finding that he had neither actual nor constructive notice of it. There being no record of the memorandum of the conditional sale in which a lien was reserved, and the plaintiff, being a subsequent purchaser without actual or constructive notice, the lien is not valid against him, and cannot be made a defense against his right and title."³

The mortgagee's right to recover the value of the mortgaged property which has been seized under an attachment and sold, is not affected by the fact that he has assigned the

¹ Robinson v. Fitch, 26 Ohio St. 659, opinion by Gilmore, J.

² Bond v. Mitchell, 3 Barb. (N. Y.) 304; McIsaacs v. Hobbs, 8 Dana (Ky.) 270; Ingraham v. Martin, 15 Me. 373; Wheeler v. Train, 3 Pick. (Mass.) 255; Collins v. Evans, 15 Pick. (Mass.) 63; Vandenberg v. Van Valkenberg, 8 Barb. (N. Y.) 217; Pattison v. Adams, 7 Hill (N. Y.) 126.

³ McNally v. Bailey (N. H.), 18 At. Rep. 745.

mortgage as collateral security for a debt, if, before suit is brought, the mortgage is surrendered to him by the assignee.¹

§ 768. **An Assignment Need Not Be Recorded.**—No deed or writing is made essential by law to the transfer of title to personal property. A purchaser must take it upon his vendor's warranty of title. A mortgage duly recorded gives certain rights to the mortgagee, created and defined by the statute, but the statute does not change the nature of the property nor require that all subsequent changes in title shall be shown upon the record. Thus, an assignment or release of the mortgage is not required to be recorded. The mortgagor and mortgagee may join in the sale, which will give perfect title to the chattel sold, and the record furnishes no evidence of it.²

§ 769. **The Assignment Needs No Seal.**—Where a mortgage is given upon personal property to secure the payment of a debt due by note, the assignment of the note and mortgage, whether the assignment be under seal or not, vests in the assignee the right of action in the mortgagee.³ It is not necessary that the assignment of the note or mortgage should be under seal.⁴

The assignment of the note need not be under seal, since the mortgage itself is not required to be sealed. As to personal estate, no instrument under seal is necessary. In order to record a mortgage of personal property it must of course be in writing, but a seal is not essential to the validity of the mortgage.⁵

§ 770. **Payment by Creditor—Equitable Assignment.**—When a creditor of a mortgagor attaches a part of the property, and tenders the mortgagee the amount due to him, and

¹ *Eddy v. McCall*, 77 Mich. 242.

² *Bigelow v. Smith*, 2 Allen (Mass.) 264; *Baxter v. Gilbert*, 12 Abb. Pr. (N. Y.) 97.

³ *Southerin v. Mendum*, 5 N. H. 420; *Rigney v. Lovejoy*, 13 N. H. 247; *Jackson v. Blodget*, 5 Cow. (N. Y.) 202.

⁴ *Gilchrist v. Patterson*, 18 Ark. 575.

⁵ *Despatch Line of Packets v. Bellamy Co.*, 12 N. H. 205. See, also, *Milton v. Mosher*, 7 Met. (Mass.) 244.

he accepts it and delivers the note and mortgage to the creditor; it effects an equitable assignment of the debt and mortgage. If the creditor afterwards obtains an execution against the mortgagor and delivers it with the note and mortgage to an officer, who, under the creditor's direction, takes the property, the part attached and a part not in his possession, the mortgagor cannot maintain replevin for that which was exempt.¹

§ 771. **After Tender—Right of Mortgagee.**—An attaching creditor of personal property who, after a demand by the mortgagee of the amount due him upon his mortgage, which includes said property and other articles exempt by law from attachment, tenders the amount due the mortgagee, cannot maintain a bill in equity to compel the mortgagee to assign the mortgage to him. If the mortgage should be assigned to the attaching creditor, he could not hold the mortgage and preserve his attachment. It would be necessary that one of the securities should yield. Either the lien upon the property secured by the mortgage would be void, or the lien by attachment would be void. The assignment, therefore, could not aid the creditor in securing his debt legitimately. The statute has made no provision for such an assignment of the mortgagee, but contemplates the survival of the mortgage or its discharge. There is no reason in equity why the mortgage shall be assigned to the attaching creditor.²

§ 772. **Revesting Title.**—A note secured by a mortgage before an indorsement will not defeat an action to enforce the mortgage, where it appears that the assignment was made to secure the owner of the debt. Thus, the note had been indorsed over as conditional security and payment of the debt, and had been delivered back to the mortgagee. By such delivery the title to the note and the mortgage became revested by such delivery.³

¹ *Denno v. Nash*, 60 Vt. 334.

² *Cochrane v. Rich*, 142 Mass. 15.

³ *Norris v. Hix*, 74 Iowa 524.

§ 773. **Assignment of Mortgage Without the Debt.**—An assignment of the mortgage without the debt is a nullity.¹

A party loaned money and took back as security an assignment of a mortgage which was past due. The assignment was made, but the note was not transferred. It was held that if essential to give effect to the assignment, it might be held that the assignee acquired an interest in the debt, for which both the note and the mortgage were security; that the mortgage being incident to the debt, not to the note, the retention of the latter by the assignor did not conclusively establish that the assignor did not intend to transfer the debt with the mortgage, but the legal effect of the transaction was to transfer the property embraced in the mortgage as security for the money loaned by the assignee. When a mortgagee assigns a mortgage he transfers the property itself. The mortgage is the muniment of the title and stands as its representative, and the assignee acquires by the assignment the mortgagee's title to the property, and whatever right the mortgagee has against the mortgagor can be asserted by the assignee. And if suit is begun by the assignee he stands in the same place in respect to the property as the mortgagee would occupy if there had been no assignment, and was claiming the property under the mortgage.²

§ 774. **Warranty of Title to the Mortgaged Property Cannot be Implied.**—No warranty to the title of the mortgaged property can be implied by the assignment of the debt. Thus, in an assignment, the clause “* * * all of my interest in the within instrument” contains no expressed warranty and does not include an implied one, and leaves the assignor without any legal interest that can be affected by the result of personal action.³

¹ *Jackson v. Willard*, 4 Johns. (N. Y.) 43; *Jackson v. Bronson*, 19 Johns. (N. Y.) 325; *Wilson v. Troup*, 2 Cow. (N. Y.) 231; *Polhemus v. Trainer*, 30 Cal. 685; *Merritt v. Bartholick*, 47 Barb. (N. Y.) 253; 36 N. Y. 44; *Carpenter v. Longan*, 16 Wall. 271.

² *Campbell v. Birch*, 60 N. Y. 214. See *Hill v. Beebe*, 13 N. Y. 556.

³ *Jones v. Huggefords*, 3 Met. (Mass.) 515.

ARTICLE II.—RIGHTS OF THE ASSIGNEE.

- 775. Status.
- 776. Assignment of Lease to Assignee of Mortgage.
- 777. Assignee *pro tanto*.
- 778. Rights of Assignee of Mortgage and Assignee for Benefit of Creditors.
- 779. Part Assignment of the Debt.
- 780. Right to Protect his Interest.
- 781. The Security Follows the Debt.
- 782. Illinois Rule.
- 783. Pennsylvania Rule.
- 784. Non-Negotiable Instruments.
- 785. Future Advances.
- 786. Right of Possession.
- 787. Release of Mortgage by Mistake.

§ 775. **Status.**—A mortgagee is *pro tanto* a purchaser, and the assignee of a mortgage without notice is on the same footing as a *bona fide* mortgagee. He is entitled to rely upon the record, and when that shows that he has a valid title he will be protected against unknown liens and against latent defects. The mortgagee is entitled to protection as a *bona fide* grantee. So, the assignee of a mortgage without notice is on the same footing with the *bona fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects.¹

So, a *bona fide* purchaser before maturity of a promissory note, secured by a chattel mortgage, takes it as he takes the note, free from any equities which existed in favor of third parties, while it was held by the mortgagee.²

So, when a mortgage given at the same time with the execution of a negotiable note and to secure payment of it, is subsequently, but before maturity of the note, transferred *bona fide* for value, with the note, the holder of the note, when obliged to resort to the mortgage, is unaffected by any equities arising between the mortgagor and the mortgagee

¹ *Pierce v. Faunce*, 47 Me. 507.

² *Gould v. Marsh*, 1 Hun (N. Y.) 566; *Jackson v. Blodget*, 5 Cow. (N. Y.) 202; *Jackson v. Willard*, 4 Johns. (N. Y.) 43.

subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. He takes the mortgage as he took the note, free from the objections to which it was liable in the hands of the mortgagee.¹

The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract. To let in such a defense against the assignee would be a clear departure from the agreement of the mortgagor and the mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired such an advantage he should have given a non-negotiable instrument,² because if one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who puts trust and confidence in the deceiver should be a loser rather than a stranger.³

The assignment of the note carries the mortgage with it.⁴

The Ohio Supreme Court holds a different opinion. It holds that negotiable notes are made by the statute, while there is no such statutory provision as to mortgages, and that hence the assignee takes the mortgage as he would any other chose in action, subject to all equities which subsisted against it while in the hands of the original owner.⁵

In reviewing the Ohio decision, the United States Supreme Court, per Swayne, J., says: "To this view of the subject there are several answers. The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable

¹ *Reeves v. Scully*, Walk. Ch. (Mich.) 248; *Fisher v. Otis*, 3 Chand. (Wis.) 88; *Martineau v. McCollum*, 4 Chand. (Wis.) 158; *Bloomer v. Henderson*, 8 Mich. 395; *Potts v. Blackwell*, 4 Jones (N. Car.) Eq. 58; *Cicotte v. Gagnier*, 2 Mich. 381; *Palmer v. Yates*, 3 Sand. (N. Y.) 137; *Taylor v. Page*, 6 Allen (Mass.) 86; *Croft v. Bunster*, 9 Wis. 503; *Cornell v. Hilchens*, 11 Wis. 353.

² *Carpenter v. Longan*, 16 Wall. (U. S.) 271.

³ *Hern v. Nicholls*, 1 Salk. 289.

⁴ *Jackson v. Blodget*, 5 Cow. (N. Y.) 202; *Jackson v. Willard*, 4 Johns. (N. Y.) 48.

⁵ *Baily v. Smith*, 14 Ohio St. 396.

at law it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

"All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debts which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.* * * * *Matthews v. Wallwyn*¹ is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently, and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere se-

¹4 Vesey 118.

curity. He said, finally: 'The debt, therefore, is the principal thing, and it is obvious that, if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment.'

"The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity. So, neither can it be worse."¹

In case of partnership, an assignment by one of the firm of all the interest he has in, on and to the stock of goods, notes and accounts due to the firm, vests the assignee with the interest of the assignor in a mortgage held by the firm to secure a note due to it, and the assignee must be joined with the other partners in an action for the conversion of the mortgaged property.²

§ 776. **Assignment of Lease.**—An assignment of a lease of the mortgaged property, by a chattel mortgagor to an assignee of the mortgage, with authority to collect the rents accruing under such lease, does not constitute such a change of possession as to dispense with filing and renewing the mortgage, as required by statute, where the lessee is allowed to remain in actual possession of the mortgaged property.³

When a lease provides that fixtures placed on land by the lessee shall retain their character of personalty, and the lessee mortgages to a third person his interest in the lease, and in all fixtures then on the land, or to be placed there by him, and thereafter assigns his interest in the lease, the mortgage will, in equity, operate to create a lien on fixtures

¹ *Carpenter v. Longan*, 16 Wall. (U. S.) 271.

² *Keith v. Ham* (Ala.), 7 South. Rep. 234.

³ *National Bank v. Summers*, 75 Mich. 107.

purchased and placed on the land by the mortgagor subsequent to its date, which may be enforced in the hands of the assignee, who took with notice of the mortgage. But such lien cannot be enforced against property placed on the land by the assignee, since his acceptance of the lease could not bind him to make good the personal covenants given by the mortgagor for his indebtedness. Judge Parker says the assignees did not contract that the machinery to be placed upon the property by them should be subject to the provisions of the mortgage; that they did not assume or agree to pay the mortgage, or to carry out its provisions, and could not be personally held under it.¹

§ 777. *Assignee Pro Tanto*.—A transfer of part of the notes secured by a chattel mortgage is an assignment of the mortgage *pro tanto*. Thus, a party executed a number of promissory notes, and secured the same by chattel mortgage on certain property, and the mortgagee, after receiving the notes, transferred a part of them as collateral security; the notes transferred were an assignment *pro tanto* of the mortgage, and the party receiving the notes as collaterals had an equitable assignment of so much of the chattel mortgage in question as was necessary to secure the notes held by him.²

The assignment of one of a series of notes secured by a mortgage, without any accompanying transfer of the mortgage, is an assignment *pro tanto* of the mortgage. Each assignee is, through the mortgage, chargeable with notice of the equitable interests of all the assignees, and the holder of a part of the notes, with a formal assignment of the mortgage, acquires no precedence from the fact that he is holding the mortgage.³

¹ Kribbs v. Alford, 120 N. Y. 519.

² Harman v. Barhydt, 20 Nebr. 625.

³ Studebaker v. McCargner, 20 Nebr. 500. See, also, Walker v. Schreiber, 47 Iowa 529; Sargent v. Howe, 21 Ill. 148; Hough v. Osborne, 7 Ind. 140; Anderson v. Baumgartner, 27 Mo. 80; Cullum v. Erwin, 4 Ala. 452; Nelson v. Dunn, 15 Ala. 501; Henderson v. Herrod, 10 Sm. & M. (Miss.) 631; Gwathmey v. Ragland, 1 Rand. (Va.) 466; Phelon v. Olney, 6 Cal. 478; Stevenson v. Black, Saxt. Ch. (N. J.) 338; Keyes v. Wood, 21 Vt. 331.

The mortgagee will be bound, when he agrees to assign the mortgage with one of the notes sold, though after selling the note he refuses to assign the mortgage. Thus, a mortgagee sold one of the secured notes to a party who was under no prior obligation to pay it, and agreed to assign the mortgage to him. This he afterwards refused to do, and took possession of and sold the mortgaged goods, which were sufficient to pay all the notes. It was held that the party who had taken and paid the note acquired, to that extent, an interest in the mortgage, and was entitled in equity to recover of the mortgagee the amount of such payment.¹ And generally a party taking a note from the mortgagee, secured by mortgage, acquires an equitable interest in the mortgaged goods to the extent of his investment in the mortgage debt. He is entitled to share *pro tanto* in the security.²

§ 778. **Rights of Assignee of Mortgage and Assignee for Benefit of Creditors.**—An assignee of a mortgage by assignment of date earlier than the mortgagor's petition in insolvency and the mortgagor's assignee for benefit of creditors stand in the same position as the original parties to the mortgage. The assignee of the mortgage has rights, therefore, precisely like those of the original mortgagee. And the rights of the assignee in insolvency are only those of the insolvent himself. He stands in the same place as the debtor and takes only the property and interest which he had, subject to all valid claims existing in reference to such property. His rights are only those which the insolvent himself had and could assert at the time of the insolvency, except in case of fraud.³

§ 779. **Part Assignment of the Debt.**—The transfer of any distinct part of an indebtedness secured by a mortgage carries with it the mortgage security *pro tanto*, and a satisfaction of such part extinguishes the mortgage so far as it pertains to the part so transferred and satisfied, leaving it

¹ Holway v. Gilman, 81 Me. 185.

² Moore v. Ware, 38 Me. 496.

³ Hutchinson v. Murchie, 74 Me. 187; Williamson v. Nealey, 81 Me. 447. See, also, Perry v. Hadley, 148 Mass. 48; Milliken v. Hathaway, 148 Mass. 69.

operative in regard to the amount remaining unpaid. So, when an assignee is authorized to dispose of such a part of a stock of goods, as might be necessary to pay a certain amount, and he does so, the transaction is valid. Thus, the power to take possession of the mortgaged property and to dispose of it after a certain notice of sale, conferred upon this mortgagee by the terms of the mortgage, was transferred by an assignment, so far as it was necessary to enable the assignee to realize his debt by a sale of the property, and if it required the disposition of the whole property to make the amount, the assignee could dispose of the whole, because he had a priority in payment secured to him; but when the object of the assignment was accomplished, when the debt of the assignee with the expense incurred by him in the sale has been satisfied, if any part of the property remains unsold, the mortgagee is entitled to a return of it, and the assignee can have no claim to it. An assignment to the assignee of only part of the mortgage debt, to that extent the assignee may be said to become the mortgagee of the mortgagor. So far as a residue is concerned, the mortgagee continues to be the mortgagee of the mortgagor, and responsible to him, after the whole mortgage debt is paid, if any surplus remains.

When the assignee has realized his claim, under such circumstances, he has no right to retain the surplus property for any purpose, because his interest is extinguished. The mortgagor cannot be entitled to such property, because the whole mortgage debt has not been satisfied, but the mortgagee still holds the unsatisfied part of the debt to which the mortgage was incident, and by virtue of the mortgage, and under the terms of his assignment, he alone is entitled to the surplus property, after the payment of the assignee's claim.¹ And when the assignee or the mortgagee has sold enough to satisfy his claim, all the right to the surplus, if

¹ *Emmons v. Dowe*, 2 Wis. 322.

any remains, is necessarily extinguished, and the power to sell becomes *ipso facto* void.¹

§ 780. **Right to Protect His Interest.**—Where part of the notes secured by a chattel mortgage has been assigned, the assignee is entitled to intervene in an action of replevin brought by the mortgagee to recover possession of the property.²

§ 781. **The Security Follows the Debt.**—The security, whether it consists of real or personal property, equitably follows the debt secured, and the purchaser of the debt may avail himself of it in equity without any assignment thereof except that acquired by the purchase of the debt.³

The assignment of the debt passes all of the mortgagee's interest in the property mortgaged.⁴ If the debt be in the form of a negotiable note, but it be not indorsed to the assignee, he acquires an equitable interest.⁵ But if the debt be in the form of a negotiable promissory note, which is indorsed over to the assignee before maturity, he takes it free from any equities which existed in favor of third persons while it was held by the mortgagee.⁶

§ 782. **Illinois Rule.**—The assignee takes the mortgage subject to all equities between the mortgagor and mortgagee,⁷ though he does not take subject to the latent equities of third parties.⁸

§ 783. **Pennsylvania Rule.**—The assignee of a mortgage, unless the mortgagor has estopped himself, holds it subject to all the equities to which it was liable in the hands of the assignor.⁹

¹ *Charter v. Stevens*, 3 Den. (N. Y.) 33.

² *Harman v. Barhydt*, 20 Nebr. 625.

³ *Batchelder v. Jenness*, 59 Vt. 104.

⁴ *Gaff v. Harding*, 48 Ill. 148; *Woodruff v. King*, 47 Wis. 261; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Johnson v. Hart*, 3 Johns. (N. Y.) 322; *Tison v. People's Sav. and Loan Ass'n*, 57 Ala. 323; *Rice v. Cribb*, 12 Wis. 179.

⁵ *Nelson v. Ferris*, 30 Mich. 497.

⁶ *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Judge v. Vogel*, 38 Mich. 568; *Gould v. Marsh*, 1 Hun (N. Y.) 566.

⁷ *Bryant v. Vix*, 83 Ill. 11; *Brooks v. Record*, 47 Ill. 30.

⁸ *Barbour v. White*, 37 Ill. 164; *Brooks v. Record*, 47 Ill. 30.

⁹ *Ashton's Appeal*, 73 Pa. St. 158.

§ 784. **Non-Negotiable Instruments.**—The assignee of a non-negotiable instrument has no greater rights under the instrument than his assignor; if a mortgage secures a non-negotiable note, the assignee acquires no greater rights than the mortgagee had against the mortgagor.¹

A mortgage, like a note payable to the payee only, is not negotiable, and is always subject to the defenses existing between the original parties. This is well settled and upon principle. The assignee of such a mortgage takes no greater title than his assignor.²

§ 785. **Future Advances.**—When a chattel mortgage that is given for a fixed amount, but really to secure future advances, of which none are made, is assigned in good faith and for value, to one who supposes it to be given for an actual indebtedness, the assignee obtains no greater rights than the mortgagee had, unless it is given to secure negotiable paper, when, if the assignment is made before maturity, he holds the paper and the mortgage discharged of pre-existing equities.³

If the mortgage is given to secure negotiable paper, the assignee of this paper and of the mortgage, if he becomes such in good faith for value and before maturity, may hold them discharged of pre-existing equities.⁴ But where it does not secure negotiable paper the rule is the other way, and he takes the paper subject to the same rights and equities as in the hands of the assignor.⁵

¹ *Beebe v. Bank*, 1 Johns. (N. Y.) 529; *Clute v. Robinson*, 2 Johns. (N. Y.) 595. See, also, *Davies v. Austen*, 1 Ves. Jr. 247; *Matthews v. Wallwyn*, 4 Ves. 118; *Rockwell v. Daniels*, 4 Wis. 432; *Scott v. Shreeve*, 12 Wheat. (U. S.) 605; *Walker v. Johnson*, 13 Ark. 522; *Timms v. Shannon*, 19 Md. 296; *Guerry v. Perryman*, 6 Ga. 119; *Willis v. Twambly*, 13 Mass. 206; *Johnson v. Pryor*, 5 Hayw. (Tenn.) 243; *Sharp v. Eccles*, 5 T. B. Mon. (Ky.) 72; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Faull v. Tinsman*, 36 Pa. St. 108; *Ketchum v. Foot*, 15 Vt. 258; *Smith v. Rogers*, 14 Ind. 224; *Shotwell v. Webb*, 23 Miss. 375; *Kleeman v. Frisbie*, 63 Ill. 482; *Warner v. Whittaker*, 6 Mich. 133.

² *Ingraham v. Disborough*, 47 N. Y. 421; *Trustees v. Wheeler*, 61 N. Y. 88.

³ *Judge v. Vogel*, 38 Mich. 568; *Carpenter v. Longan*, 16 Wall. (U. S.) 271.

⁴ *Reeves v. Scully*, Walk. Ch. (Mich.) 248; *Dutton v. Ives*, 5 Mich. 515.

⁵ *Russell v. Waite*, Walk. Ch. (Mich.) 31; *Nichols v. Lee*, 10 Mich. 526; *Trustees v. Wheeler*, 61 N. Y. 88.

§ 786. **Right of Possession.**—The assignee acquires the same right to possession that the mortgagee had before the assignment, under a safety clause, or under a clause providing for taking possession if any attachment or execution should be levied upon the property.¹ So, when the mortgagor voluntarily surrenders the property to the mortgagee, who sells it, it entitles the vendee to take and retain possession as against the mortgagor, at least until the debt is paid.²

§ 787. **Release of Mortgage by Mistake.**—Where a mortgage of chattels, given to secure several notes, was released by mistake by the mortgagee, who had previously assigned the notes, supposing them to have been paid, such release will not discharge the property in the hands of a purchaser having notice of such assignment, as to any one of the notes remaining unpaid.³

ARTICLE III.—RIGHT OF ACTION.

788. His Right of Action.

789. Fraudulent Mortgage.

790. Bill of Discovery.

791. Mortgagee Being Surety.

792. Accommodation Notes.

793. Defense to Such Mortgages.

§ 788. **His Right of Action.**—An assignment invests the assignee with all the rights of the mortgagee to the property. But he has no right to sue for injuries to the property before the assignment. To maintain such a suit the assignee must have been the owner or entitled to the possession of the property, or had some right or interest in it, at the time of the wrongful act complained of.⁴

After a mortgage of property has been attached, in an action against the mortgagor, and the mortgagee assigns his record title and records the assignment, he cannot afterwards

¹ *Beach v. Derby*, 19 Ill. 617.

² *Sirrinc v. Briggs*, 31 Mich. 443.

³ *Martindale v. Burch*, 57 Iowa 291.

⁴ *Bowers v. Bodley*, 4 Ill. App. 279.

maintain an action against the officer for unlawful conversion of the property. The legal title to the property would pass to the mortgagee subject to the lien ; so it would, on the same ground, pass to the assignee of the mortgagee.¹

§ 789. **Fraudulent Mortgage.**—An assignee in insolvency who has taken possession of personal property which had been mortgaged by the debtor in fraud of creditors, and filed a bill in equity to prevent the transfer of the mortgage by the mortgagee, may hold the property against one to whom the mortgage and note which it was given to secure were subsequently assigned for a good consideration and without notice. If the assignee had acquired title in good faith and for a valuable consideration, before any act had been done to avoid the mortgage, he would have stood on different ground.²

§ 790. **Bill of Discovery.**—A judgment creditor of a mortgagee may file a bill of discovery against an alleged fraudulent assignee of the mortgage, and upon proof of the fraudulent character of the assignment, may have the mortgage fund applied to the payment of the judgment.³

§ 791. **Mortgagee Being a Surety.**—A mortgage founded on a valuable and adequate consideration will not be declared void for fraud when assailed by a subsequent purchaser at an execution sale against the mortgagor, on proof of the mortgagor's embarrassed condition and relationship to the mortgagee. Such mortgage will inure to the benefit of the creditor to whom the surety is bound,⁴ and one who takes such a mortgage by assignment has notice of such trust and the mortgage is subject to it. Such assignment, in equity, is void, and the assignee will be regarded as holding the legal title to the property in place of the original trustee.⁵

¹ *Horne v. Briggs*, 98 Mass. 510.

² *Bigelow v. Smith*, 2 Allen (Mass.) 264.

³ *Doughten v. Gray*, 2 Stock. (N. J.) 323.

⁴ *Troy v. Smith*, 33 Ala. 469.

⁵ *Ex parte White*, 2 Low. D. C. 343.

§ 792. **Accommodation Notes.**—A party executed and delivered two notes and a mortgage of personal property to secure them, to indemnify the mortgagee for indorsements made and to be made for the mortgagor's accommodation, with power to dispose of the property if the notes indorsed were not paid. The mortgagee indorsed these notes to the full amount of the security, but before he had become liable on any of his indorsements he assigned the mortgage and the notes secured to a third party, with the same power of disposal. This assignment was valid and conveyed to the assignee the interest of the mortgagee in the notes and mortgage. The mortgagee afterwards paid a large amount of his indorsed paper, and it was held that the assignee at once took the benefit of these payments, and acquired to that extent a definite interest in the mortgaged property.¹

§ 793. **Defense to Such Mortgage.**—Because a mortgage is made for a temporary accommodation is no defense, when in the hands of an assignee who took it in good faith, even if the mortgagee falsely represented himself as solvent, nor can a defense be made because the mortgagee agreed to use the mortgage only as collateral security, but instead of this raised the money upon it.²

ARTICLE IV.—EXTINGUISHMENT.

794. No Revival of Mortgage.

§ 794. **No Revival of Mortgage.**—After a fulfillment of the condition of a mortgage, and it is extinguished, the assignment of it could not resuscitate it, although the assignment be upon a valuable consideration.³ Thus, where the condition of a mortgage is that the mortgagor shall save harmless the mortgagee against liability as his surety on a note due

¹ *Potter v. Holden*, 31 Conn. 385.

² *Jacobsen v. Dodd*, 32 N. J. Eq. 403.

³ *Bonham v. Galloway*, 18 Ill. 68; *Mead v. York*, 2 Sel. (N. Y.) 449; *Abbott v. Upton*, 19 Pick. (Mass.) 434.

to a third person, the condition is performed when the mortgagor procures the cancellation of the note, and the substitution of a new note in its stead, with a different surety; the mortgage being thus extinguished, it cannot then be assigned to the surety on the new note, for his indemnification, even though the assignment be made with the assent of the mortgagor, for valuable consideration and contemporaneously with the cancellation and substitution of the notes. The court said, per Walker, C. J.: "The mortgage in this case was an assignment upon a specified condition; and upon the performance of the condition the mortgage was extinguished, and the title revested in the mortgagor. This proposition necessarily results from the fact that the mortgage is but a security for the discharge of a particular debt or duty. * * * The condition of the mortgage was to save harmless the surety of the mortgagor. This the mortgagor unquestionably did when he obtained a cancellation of the note upon which the mortgagee was the surety, and substituted a bill of exchange, with a different surety, and obtained a discharge of the mortgagee. The mortgage was thus extinguished; and being extinguished, the assignment of it could not resuscitate it, although the assignment might be upon a valuable consideration. * * * Even the consent of the mortgagor that it should be assigned could not of itself revive it."¹

Although the title to personal property conveyed in a mortgage becomes absolute in the mortgagee upon failure to perform the condition, yet if the mortgagee or his assignee afterwards accept payment of the debt, or discharge the liability secured by the mortgage, the title revests in the mortgagor, without a redelivery or resale and without a cancellation of the mortgage.² It is true that the introduction of

¹ *Brooks v. Ruff*, 37 Ala. 371.

² *Butler v. Tufts*, 13 Me. 302; *Flanders v. Barstow*, 18 Me. 357; *Paul v. Hayford*, 22 Me. 234; *Greene v. Dingley*, 24 Me. 131; *Leighton v. Shapley*, 8 N. H. 359; *Parks v. Hall*, 2 Pick. (Mass.) 206; *Barry v. Bennett*, 7 Met. (Mass.) 354; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Harrison v. Hicks*, 1 Port. (Ala.) 423.

a mortgage made to indemnify a surety, after proof of its execution, is *prima facie* evidence of title. But such title may be avoided by proof introduced in defense that the debt has been paid, or the liability of the surety discharged.¹ And generally a mortgage of personal property, given to sureties to protect them against their suretyship, is not in force after the creditor has discharged the sureties. Thus, where a debtor gave to his sureties such a mortgage to secure them against their suretyship upon a note, and they assigned the mortgage to the creditor for his security, taking from him a discharge, under seal, of their liability on the note, the mortgage is no longer in force. Because the design of such a mortgage being merely to protect the sureties against the note, and that protection having been given by the creditor's discharge, the condition of the mortgage is fulfilled, and the mortgage is extinguished.²

¹ *Davis v. Mills*, 18 Pick. (Mass.) 394.

² *Sumner v. Bachelder*, 30 Me. 35.

CHAPTER XVI.

RIGHTS OF ATTACHMENT AND EXECUTION
CREDITORS.

ARTICLE I.—AS TO MORTGAGOR'S INTEREST.

- 795. At Common Law.
- 796. Under Statutory Enactment.
- 797. In Equity.
- 798. Equitable Rule Adopted.
- 799. Right of Possession Until Demanded by Mortgagee.
- 800. Fraudulent Mortgage.
- 801. Right of Action by Mortgagee.
- 802. When Assignee Surrenders Mortgage to Mortgagee.
- 803. After Default.
- 804. Taking Possession Under the Safety Clause.
- 805. Liability of Officer for Taking Wrongful Possession.
- 806. Seizure and Sale Without Recognizing the Mortgage Lien.
- 807. Contrary Doctrine.
- 808. Mortgagee May Waive his Lien by Attachment.
- 809. Giving an Accountable Receipt.

§ 795. **At Common Law.**—At common law the mortgagor of personal property has no interest subject to levy and sale.¹ And the chattel-mortgage property or pawn is not liable to attachment in action against the pawnor or mortgagor. If goods be pawned and afterwards a judgment is recovered against the pawnor, the goods cannot be taken in execution until the money is paid or tendered to the pawnee.²

At common law, mortgaged personalty could not be taken on an execution against the mortgagor, because the legal title was not in him. Equities and right to redeem are not subject to execution at common law, because there is no legal right, and therefore no legal remedy.³

¹ *Vanslyck v. Mills*, 34 Iowa 375; *Scott v. Scholey*, 8 East 501; *Metcalf v. Scholey*, 5 B. & P. 461; *The King v. Hanger*, 3 Bulst. 17; *Badlam v. Tucker*, 1 Pick. (Mass.) 389.

² *The King v. Hanger*, 3 Bulst. 17; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Jennings v. McIlroy*, 42 Ark. 236.

³ *Sherman v. Davis*, 137 Mass. 132. See, also, *Haven v. Low*, 2 N. H. 16; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 467; *Mattison v. Baucus*, 1 Comst. (N.

§ 796. **Under Statutory Enactment.**—By statute, in many States, the interest of the mortgagor can be reached by attachment or execution. But such enactment does not now permit the mortgagor's interest to be taken on execution or attachment unless it be done in a manner provided by statute.¹

§ 797. **In Equity.**—It is only by statute that equities or rights to redeem are subject to attachment by ordinary process; and when no statute has authorized the attachment of such interest in personal property, a creditor can reach such interest of his debtor only by resorting to a court of equity, where he may be let in to redeem the incumbrance.²

§ 798. **Equitable Rule Adopted.**—In some of the States, irrespective of statutory enactments, when the mortgagor holds possession by the terms of the mortgage, he has an interest which may be reached and sold on execution.³ Thus, in New York, while the property remains in the possession of the mortgagor, and the conditions are unbroken, he has an interest subject to his control and disposition. He can sell and deliver such title as remains to him. The purchaser takes it, in case of a sale, subject to the lien of the mortgage, whether its existence was ascertained by the purchaser or not, or whether the mortgagor mentions it. It follows, of course, that the interest of the mortgagor is clearly subject to levy and sale by an execution creditor, and the purchaser would obtain at such sale the same title as that of which the mortgagor is possessed, and no more nor less.⁴

Y.) 295; *Ballune v. Wallace*, 2 Rich. (S. Car.) 80; *Conrad v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 440. See, also, *Emery v. Seavey*, 148 Mass. 566.

¹ *Sherman v. Davis*, 137 Mass. 132; *Evans v. Warren*, 122 Mass. 303; *Prout v. Root*, 116 Mass. 410; *Hunt v. Holton*, 13 Pick. (Mass.) 216; *Barrows v. Turner*, 50 Me. 127; *Deering v. Lord*, 45 Me. 293; *Haven v. Low*, 2 N. H. 13; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461; *Wolfe v. Dorr*, 24 Me. 104.

² *Shirley v. Watts*, 3 Atk. 200.

³ *Hall v. Sampson*, 35 N. Y. 274; *Hamill v. Gillespie*, 48 N. Y. 556; *More v. Bennett*, 48 N. Y. 472.

⁴ *Bailey v. Burton*, 8 Wend. (N. Y.) 339; *Hull v. Carnley*, 11 N. Y. 501; *Gould v. Asseler*, 22 N. Y. 225; *Hanning v. Monaghan*, 28 N. Y. 585; *Hathaway v. Brayman*, 42 N. Y. 322.

This rule obtains in New Jersey, where a chattel mortgage is regarded as a mere security for the debt, and does not entirely divest the property of the mortgagor. This interest in the chattels mortgaged is such an interest as may be seized and sold under the ordinary process of law against the mortgagor.

The court, per Depue, J., says: "The legal estate of the mortgagee, after breach of condition, has all the incidents of a common-law title for the purpose of an action of ejectment, but its existence is, nevertheless, regarded as compatible with the legal estate, at the same time, in the mortgagor. This legal estate of the mortgagor is capable of conveyance, mortgage, or a sale under execution against him, at any time before his estate is divested by foreclosure. The cases clearly recognize the equity of redemption of a mortgagor as a legal estate, and as such it must subsist until extinguished in the manner in which legal estates are by law extinguishable."¹

Under the equitable rule, an execution creditor who has levied on a chattel interest covered by a mortgage may go into equity for the redemption of the mortgage, the same as a judgment creditor at law is entitled to redeem an incumbrance upon land, and by his levy on the chattels mortgaged will acquire a preference according to his legal priority.²

By the adoption of the equitable rule the entire property in the chattel mortgaged does not pass to the mortgagee, *eo instante*, on the execution of the mortgage, and the mortgagor, notwithstanding the mortgage, has a property in the chattels remaining in him, which is subject to execution and sale before breach of the condition. It is argued that, having the continuance of the possessionary right of the mortgagor, the rights of the mortgagee and mortgagor correspond with those of the lessor and lessee of chattels during the term of the demise. A lessee of chattels during

¹ Woodside v. Adams, 40 N. J. L. 417.

² McDermutt v. Strong, 4 Johns. Ch. (N. Y.) 687; Disborough v. Outcalt, Saxt. (N. J.) 299; Herbert v. Mechanics, &c., 2 C. E. Green (N. J.) 497.

his term has such property in them as may be seized and sold under execution against him, if the seizure and sale be of his estate therein only, and no substantial injury be done to the rights of the lessor.¹

Lord Kenyon, speaking of an action by the lessor against an officer selling goods leased to a tenant, under an execution against the lessee, says: "No doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term."²

So, under a bill of sale of chattels, with a condition of redemption on payment of debt and interest on demand, and a further proviso that the mortgagor should continue in possession until default, under the equitable rule the mortgagee had no such a right of possession as would enable him to sue in trover an officer selling them under execution against the mortgagor.³

A like decision was made where the mortgage contained no stipulation for possession by the mortgagor, and his right to possession until default was inferred from the naming of a future day for payment of the mortgage-money.⁴

§ 799. **Right of Possession Until Demand by Mortgagee.**—Where a chattel mortgage gives to the mortgagor the right of possession until payment of the mortgage on demand, he has an interest in the mortgaged property that may be levied upon and sold.⁵ Where a chattel mortgage provides that the mortgagor may retain possession, but he surrenders pos-

¹ *Duffill v. Spottiswoode*, 3 C. & P. 435; *Dean v. Whitaker*, 3 C. & P. 347; *Tancred v. Allgood*, 4 H. & N. 438; *Van Anwerp v. Newman*, 2 Cow. (N. Y.) 543; *Grafflin v. Jackson*, 40 N. J. L. 440.

² *Gordon v. Harper*, 7 T. R. 9.

³ *Bradley v. Copeley*, 1 C. B. 685.

⁴ *Wheeler v. Montefiore*, 2 Q. B. 133. See, also, *Nelson v. Ferris*, 30 Mich. 497; *Doughten v. Gray*, 10 N. J. Eq. 323; *Curd v. Wunder*, 5 Ohio St. 92; *Harbinson v. Harrell*, 19 Ala. 753.

⁵ *Lyman v. Rowe*, 66 How. Pr. (N. Y.) 481; *Wisser v. O'Brien*, 44 How. Pr. (N. Y.) 209; *Newsan v. Finch*, 25 Barb. (N. Y.) 175; *Livor v. Orser*, 5 Duer (N. Y.) 501; *Hull v. Carnley*, 11 N. Y. 501. Contra, *Brown v. Cook*, 3 E. D. Smith (N. Y.) 123; *Howland v. Willett*, 3 Sandf. (N. Y.) 607; *Norris v. Sowles*, 57 Vt. 360.

session, he then has no longer an attachable interest in the chattels.¹

And the interest of a mortgagor in a chattel of which he retains possession only at the will of the mortgagee is not attachable.²

§ 800. **Fraudulent Mortgage.**—If a mortgage is fraudulent and void as to creditors, they can levy an execution upon the property as if the mortgage had not existed. The mortgage may be good as between the parties, yet voidable by creditors of the mortgagor.³

§ 801. **Right of Action by Mortgagee.**—Where a mortgagor is permitted to retain possession, as a general rule, such possession is, in law, the possession of the mortgagee, who may at any time maintain trespass, trover or replevin for any intermeddling with, or taking the property by a third party; this right of action exists where the property is taken by an officer under color of legal process, as well as when taken without authority of law.⁴

§ 802. **When Assignee Surrenders Mortgage to Mortgagee.**—A mortgagee's right to recover the value of the mortgaged property, which has been seized under an attachment and sold, is not affected by the fact that he has assigned the mortgage as collateral security for a debt, if before suit is brought the mortgage is surrendered to him by the assignee.⁵

§ 803. **After Default.**—After default, mortgaged property is not subject to be levied on, for then the mortgagee has the right to enter, or in case of a trust deed, the trustee has the right to possession of the property, and the right of the grantor or mortgagor is purely the right to redeem—an

¹ *Powers v. Elias*, 53 N. Y. Supr. Ct. 480.

² *Sams v. Armstrong*, 8 Mo. App. 573; *Perkins v. Mayfield*, 5 Port. (Ala.) 182; *Tannahill v. Tuttle*, 3 Mich. 104; *Eggleston v. Mundy*, 4 Mich. 295; *Bacon v. Kimmel*, 14 Mich. 201; *Hopkins v. Scott*, 20 Ala. 179; *Hawkins v. May*, 12 Ala. 673.

³ *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Pratt v. Wheeler*, 6 Gray (Mass.) 520; *Russell v. Dyer*, 33 N. H. 186; *Brown v. Snell*, 46 Me. 490.

⁴ *Tannahill v. Tuttle*, 3 Mich. 104; *Pickard v. Low*, 3 Shep. (Me.) 48; *Welch v. Whittemore*, 25 Me. 87; *Brackett v. Bullard*, 12 Met. (Mass.) 308.

⁵ *Eddy v. McCall*, 77 Mich. 242. See 71 Mich. 497.

equitable right, which, being disconnected from the legal right of possession, is not subject to be levied on by legal process.¹

After forfeiture the mortgagor has no interest capable of being seized and sold.²

§ 804. **Taking Possession Under the Safety Clause.**—When the mortgage contains a stipulation that in case the mortgagee shall deem himself unsafe he may take possession of the property, and he has done so, then the mortgagor has no interest that can be levied on or attached. His mere equity of redemption is not subject to sale on execution.³

§ 805. **Liability of Officer for Taking Wrongful Possession.**—If an officer takes the mortgaged property while in the mortgagor's possession, the general rule is, that the mortgagee, being entitled to possession, may sue the officer for the conversion of the property.⁴

Whenever the mortgage gives the mortgagee right of possession in case he should deem himself insecure, and an attachment has been made, after forfeiture, in New York, he can take the property and the attachment becomes invalid; and if the sheriff does not surrender the property upon demand, he becomes liable in trespass to the mortgagee.⁵

If the grounds for the attachment are put in issue by plea in abatement, this will raise other issues, as, for instance, the fact whether the defendant, within two years before the suit, fraudulently conveyed his property to hinder or delay his creditors.⁶

¹ *Thompson v. Thornton*, 21 Ala. 808.

² *Eggleston v. Mundy*, 4 Mich. 295; *Boltes v. Ripp*, 3 Keyes (N. Y.) 210; *Baxter v. Gilbert*, 12 Abb. Pr. (N. Y.) 97; *Porter v. Parmly*, 34 N. Y. Supr. Ct. 398; *Stewart v. Slater*, 6 Duer (N. Y.) 83; *Champlin v. Johnson*, 39 Barb. (N. Y.) 606; *Ford v. Williams*, 13 N. Y. 577; *Prior v. White*, 12 Ill. 261; *Hull v. Carnley*, 11 N. Y. 502; *Hall v. Sampson*, 35 N. Y. 274; *Galen v. Brown*, 22 N. Y. 37; *Manchester v. Tibbetts*, 121 N. Y. 219.

³ *Nichols v. Mead*, 2 Lans. (N. Y.) 222; *Galen v. Brown*, 22 N. Y. 37; *Hall v. Sampson*, 35 N. Y. 274; *Eggleston v. Mundy*, 4 Mich. 295; *Gelhaer v. Ross*, 1 Hill (N. Y.) 117; *Palmer v. Forbes*, 23 Ill. 301; *Worthington v. Hanna*, 23 Mich. 530.

⁴ *Worthington v. Hanna*, 23 Mich. 530.

⁵ *Hall v. Sampson*, 35 N. Y. 274.

⁶ *Weber v. Mick*, 131 Ill. 520.

§ 806. **Seizure and Sale Without Recognizing the Mortgage Lien.**—Selling the entire property generally, without recognizing the mortgage lien, does not, in New York, make the officer liable to the mortgagee before forfeiture.¹ The effect of such sale on execution against the mortgagor would be the same as a voluntary transfer of the mortgaged articles by the mortgagor to a third person. “Such a disposition of them would not oust the mortgagee, whether his interest was repudiated or was recognized. Such sales, whether judicial or private, pass such title as the vendor, or party against whom the authority to sell exists, had to part with, and no other. The mortgagee, it is true, may be in a worse position, in some respects, by the property passing into other hands, for he must keep sight of it, so as to be able to find and take possession of it when his title shall become absolute by a default in payment. But he is not legally prejudiced, for the mortgagor may, when not restrained by the terms of the mortgage, remove it from place to place at his pleasure. He has the same right to do so which a purchaser on execution against him has. I do not, therefore, see any reason why such sale * * * should be considered a conversion of the property or a disturbance of the mortgagee’s title.” By such sale the title is not divested or interfered with, and there is no disposition of the *corpus* of the property which was not authorized by law. When the mortgagee’s title becomes absolute, he can claim his goods in the hands of the purchaser, or maintain an action if they should be withheld from him.

Judge Denio says that the sheriff had a right to sell the interest of the mortgagor and to deliver the property to the purchaser, who could hold it until law day, or to pay the mortgage debt. Selling the whole interest, ignoring the existence of the mortgage, or limiting the sale of the mortgagor’s interest, would be precisely the same.²

This rule is not in accord with the weight of authority.

¹ *Manning v. Monaghan*, 28 N. Y. 585; *Hamill v. Gillespie*, 48 N. Y. 556.

² *Hull v. Carnley*, 11 N. Y. 501.

Under the statute giving any person other than the defendant in attachment the right to interplead and claim the property attached, a judgment in favor of a mortgagee so interpleading will be conclusive of his rights under the mortgage as against the attaching creditor. But third persons cannot litigate, in the name of the defendant in attachment, their rights to the property attached.¹

§ 807. **Contrary Doctrine.**—The doctrine, as expressed in the New York cases, that selling the entire property mortgaged does not make the officer liable to the mortgagee, is contrary to the weight of authority, which holds that, if the sheriff sells the entire property of the mortgagor under execution against the mortgagor, he is liable in trover at the suit of the mortgagee. Although the sheriff may levy upon and take possession of mortgaged personal property, by virtue of a *fieri facias* against the mortgagor, yet the equity of redemption is alone liable to levy and sale. If he should sell the entire interest in the property, his sale would include the right of the mortgagee as well as of the mortgagor. If he sells the interest of the mortgagee, under such circumstances, he is liable in an action of trover.²

Generally it is held that an officer cannot levy on personal property which is mortgaged, whether in possession of the mortgagor or mortgagee, even if the mortgage is not due, unless it contains an express stipulation permitting the mortgagor to retain possession for a definite period, nor then, if that period has expired.³

Where the mortgage expressly authorizes the mortgagor to retain possession of the property until default in payment, according to its tenor, but contains a stipulation that, if the property should be attached by the creditors of the mortgagor, it should be lawful for the mortgagee to take imme-

¹ Weber v. Mick, 131 Ill. 520.

² Smyth v. Tankersly, 20 Ala. 212; Perminter v. Kelly, 18 Ala. 716; O'Neal v. Wilson, 21 Ala. 288; McConeghy v. McCaw, 31 Ala. 447.

³ Eggleston v. Mundy, 4 Mich. 295; Tannahill v. Tuttle, 3 Mich. 104; Frisbee v. Langworthy, 11 Wis. 375; Cotton v. Watkins, 6 Wis. 629; Cotton v. Marsh, 3 Wis. 221; Wheeler v. McFarland, 10 Wend. (N. Y.) 318.

mediate possession, then the right to immediate possession of the property is in the mortgagee, in the absence of any agreement to the contrary, and that right is limited no further than the intention of the parties, as manifested by the instrument. The law will not say that an attachment is legal, when it can give no right to the officer who makes it to hold possession, and can create no lien for the security of the debt of the creditor.¹ A mortgage contained a provision that, in the event it was not paid at maturity, the mortgagee should have the right to sell the property. The property was attached in the hands of the mortgagor, and sold by the officer. It was decided that the title to the property was in the mortgagee, and that before condition broken he could maintain trover against an attaching creditor for a wrongful conversion. The court says: "The mortgagor had no more than a permissive license, resulting by implication from the covenant in the mortgage; it is unnecessary to say whether the mortgagee could have interfered with this possession while it continued according to the terms of the agreement. But it becomes a different question when a stranger takes possession, and thereby puts the title of the true owner in jeopardy."²

It is the general doctrine that an officer cannot levy upon personal property which is mortgaged, whether in possession of the mortgagor or mortgagee, even if the mortgage is not due, unless the mortgage contains an express stipulation permitting the mortgagor to retain possession for a definite period; nor then if that period has elapsed.³

But for such a stipulation no one will contend that there is any right in the mortgagor which can be levied upon by an officer; any one interfering with the property, at least to the prejudice of the mortgagee's rights, is liable to him in an action of trespass. This clause in the mortgage is intended

¹ *Welch v. Whittemore*, 25 Me. 86.

² *Spriggs v. Camp*, 2 Spears (S. Car.) 181.

³ *King v. Bailey*, 8 Mo. 332; *Perkins v. Mayfield*, 5 Port. (Ala.) 182; *Mattison v. Baucus*, 1 Comst. (N. Y.) 295; *Howland v. Willet*, 3 Sandf. (N. Y.) 607; *Wheeler v. McFarland*, 10 Wend. (N. Y.) 318; *Leadbetter v. Leadbetter* (N. Y.), 26 N. E. Rep. 284.

for the protection of the mortgagee, and whether the acts should be done by the mortgagor or by some one else, the mortgagor can have no further rights under the stipulation. The legal title and the right to the possession of the property is then, if not before, perfect in the mortgagee; he is, in the judgment of law, the absolute owner, and if he had not and could not obtain the immediate possession of the property, whoever retains it, whether mortgagor, or constable, or any one else, is thenceforth a mere bailee at sufferance.¹

Whether, at common law, a mortgagor has an equity of redemption, and courts of equity may interfere and allow a redemption, where there is no statutory provision to redeem, is not definitely settled, although the later doctrine seems to be that equity will interfere to prevent gross injustice.²

Without a stipulation to the contrary the mortgagee is entitled to immediate possession, and the possession of the mortgagor is the possession of the mortgagee, so that he may reduce the property to possession at any time, and may maintain trespass, trover or replevin, as the case may be, for any intermeddling with, or taking of the property by a third party while in the possession of the mortgagor, equally as though such possession were actually in himself.³ So absolute is the mortgagee's title and consequent right to immediate possession that even the agreement that the mortgagor may retain possession until condition broken is personal, and the mortgagee may maintain trover for the property, before condition broken, against a purchaser from such mortgagor. Such agreement is not assignable to others, either by the mortgagor or by sale or levy on his property for debt.⁴

¹ *Marsh v. Lawrence*, 4 Cow. (N. Y.) 469; *Otis v. Wood*, 3 Wend. (N. Y.) 500; *Bailey v. Barton*, 8 Wend. (N. Y.) 346; *Mattison v. Baucus*, 1 Comst. (N. Y.) 295; *Fuller v. Acker*, 1 Hill (N. Y.) 473; *Rogers v. Ins. Co.*, 6 Paige (N. Y.) 583.

² *Brown v. Lipscomb*, 9 Port. (Ala.) 472; *White v. Cole*, 24 Wend. (N. Y.) 117.

³ *Welch v. Whittemore*, 25 Me. 86; *Paul v. Hayford*, 22 Me. 234; *Brackett v. Bullard*, 12 Met. (Mass.) 310; *Alden v. Lincoln*, 18 Met. (Mass.) 204; *Ferguson v. Thomas*, 26 Me. 499; *Case v. Winshop*, 4 Blackf. (Ind.) 425.

⁴ *Ballune v. Wallace*, 2 Rich. (S. Car.) 80; *Wood v. Dudley*, '8 Vt. 430; *Holmes v. Bell*, 3 Cush. (Mass.) 322.

§ 808. **Mortgagee May Waive His Lien by Attachment.**—A mortgagee of personal property, by attaching it in an action for the debt, waives his claim under the mortgage. Thus, a party holding personal property by virtue of a mortgage or pledge may waive his claim under such mortgage or pledge and attach the property in a suit to recover the debt for which the mortgage or pledge was given. The court says, per Lord, J.: "Such attachment is, in itself, a waiver of the claim under the mortgage. The liens respectively created by mortgage and by attachment on the same property are essentially different, and cannot co-exist. They affect very differently, also, the rights of third persons. A stranger may attach personal property, subject to the incumbrance of a prior lien, by attachment, with no responsibility for such prior lien; if the lien is by mortgage he must pay the amount secured by such mortgage before his attachment is effectual."¹

So, also, where a mortgagee of personal property attaches the property mortgaged, in an action for another debt due to him from the mortgagor, and after judgment satisfies his execution out of the property attached, he thereby waives his right to set up the mortgage against subsequent attaching creditors of the same property. When the mortgagee attaches such property he puts it out of his power and control and places it in the custody of the law. He thereby makes it liable to subsequent attachment by other creditors. While it thus remains, by his direction, on his writ and process, in the hands of the officer and in the custody of the law, he cannot interfere at all with the property as mortgagee, nor can he make any complaint, nor maintain any suit against subsequent attaching creditors, nor against the officer who makes the subsequent attachments, for it is the right of the creditors and the duty of the officer to make the subsequent attachments. The two remedies, by attachment and under

¹ *Evans v. Warren*, 122 Mass. 303. See, also, *Buck v. Ingersoll*, 11 Met. (Mass.) 226; *Libby v. Cushman*, 29 Me. 429; *Whitney v. Farrar*, 51 Me. 418.

the mortgage, are inconsistent and cannot be pursued at the same time and together.¹

§ 809. **Giving an Accountable Receipt.**—A mortgagee of chattels who gives an accountable receipt therefor to an officer attaching the property mortgaged, as the property of the mortgagor, cannot avoid his liability by showing that his claim exceeds the value of the property.²

ARTICLE II.—AS TO MORTGAGEE'S INTEREST.

810. Property in Mortgagee's Possession.

811. When the Mortgagee Holds the Legal Title.

§ 810. **Property in Mortgagee's Possession.**—A mortgagee's interest in personal property in possession, after breach of condition and before foreclosure, is not subject to attachment on a debt against the mortgagee. And this is the rule, that so long, at least, as the mortgagee's interest in personal property mortgaged, is held by him in good faith as security—before it has been in fact applied to the satisfaction of his debt by foreclosure—it cannot be attached as his property.³

But after forfeiture, and the title having become absolute in the mortgagee by foreclosure, the property may be levied on by virtue of an execution against him, although not yet taken possession of by the mortgagee.⁴

§ 811. **When the Mortgagee Holds the Legal Title.**—The interest of a mortgagee, although he has legal title, is not subject to attachment or sale under execution before entry for breach of condition with view of foreclosure.⁵

¹ Haynes v. Sanborn, 45 N. H. 429, opinion by Perley, C. J.

² Drew v. Livermore, 40 Me. 266. See, also, Johns v. Church, 12 Pick. (Mass.) 557; Robinson v. Mansfield, 18 Pick. (Mass.) 144.

³ Prout v. Root, 116 Mass. 410; Chapman v. Hunt, 13 N. J. Eq. 370; Glass v. Ellison, 9 N. H. 69; Trapnall v. State Bank, 18 Ark. 53.

⁴ Ferguson v. Lee, 9 Wend. (N. Y.) 258; Phillips v. Hawkins, 1 Fla. 262.

⁵ Morris v. Barker, 82 Ala. 272; Rickert v. Madeira, 1 Rawle (Pa.) 325; Brown v. Bates, 55 Me. 520; Huntington v. Smith, 4 Conn. 235; Trapnall v.

ARTICLE III.—LAWS OF THE STATES.

812. Alabama.	832. Mississippi.
813. Arizona.	833. Missouri.
814. Arkansas.	834. Nebraska.
815. California.	834 <i>a</i> . Nevada.
816. Colorado.	835. New Hampshire.
817. Connecticut.	836. New Jersey.
819. Delaware.	837. New York.
820. Florida.	837 <i>a</i> . North Dakota.
821. Georgia.	838. Ohio.
822. Idaho.	839. Oregon.
823. Illinois.	840. Pennsylvania.
824. Indiana.	841. Rhode Island.
825. Iowa.	842. South Carolina.
825 <i>a</i> . Statutory Provisions.	842 <i>a</i> . South Dakota.
826. Kentucky.	843. Tennessee.
827. Maine.	844. Texas.
828. Maryland.	844 <i>a</i> . Utah Territory.
829. Massachusetts.	845. Vermont.
830. Michigan.	846. Washington.
831. Minnesota.	847. Wisconsin.

§ 812. **Alabama.**—It is provided by statute that executions may be levied on an equity of redemption in either land or personal property.¹

Executions may be levied on the equity of redemption in either land or personalty, and when any interest less than an absolute title is sold, the purchaser is subrogated to all the rights of the defendant and subject to all his disabilities. And when it is once ascertained that the conveyance is to be considered and treated as a mortgage, then the consequences appertaining in equity to a mortgage are strictly observed, and the right of redemption is regarded as an inseparable incident.²

It is competent for a mortgagee, with the power to take possession and sell personal property, upon the mortgagor's default, when the property is levied upon after the forfeiture

State Bank, 18 Ark. 53; *Scott v. Mewhirter*, 49 Iowa 487; *Buck v. Sanders*, 1 Dana (Ky.) 187; *Couch v. Gerry*, 3 Har. (Del.) 280; *Marsh v. Austin*, 1 Allen (Mass.) 235; *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Nicholson v. Walker*, 4 Ill. App. 404; *Blanchard v. Colburn*, 16 Mass. 345.

¹ Code, § 3209.

² *McConeghy v. McCaw*, 31 Ala. 447; *Floyd v. Morrow*, 26 Ala. 353.

of the mortgage, to interpose a claim and try the right as the statute provides. Or he may waive his legal right and resort at once to a court of equity, where all interests may be adjusted and more ample justice dispensed.¹

§ 813. **Arizona.**—All personal property mortgaged may be attached by the creditors of the mortgagor. But before taking possession the officer must tender the mortgagee the amount of his debt. After paying the creditor's debt the surplus, if any, shall be paid to the mortgagor, or the creditor may cause to be attached the right of redemption of the mortgagor and cause the same to be sold, subject to the right of the mortgagee.²

§ 814. **Arkansas.**—A mortgagor of personal property has no interest subject to attachment or execution for a debt. A tender of the mortgage debt by the attaching creditor after the levy of his attachment of the property will not cure the illegal levy. Whilst the debt remains unpaid the mortgagor has nothing subject to execution, and nothing can be taken in attachment which is not liable to execution; and if the creditor takes nothing by attachment, he has no right to acquire property by tendering the debt. Nor will such a tender cure a void levy.

Eakin, J., says: "We can do no better than resort to the common-law principles, which in this regard have not been altered by statute, and to such former opinions of this court as may indicate its tendency to one or the other line, leaving it to the legislature to prescribe any law upon the subject which it may deem advisable." The statute which makes equitable interests in real estate liable to execution is silent as to personal property.³

§ 815. **California.**—By the Code of Civil Procedure⁴ all goods, chattels, moneys and other property, both real and

¹ *Anderson v. Hooks*, 9 Ala. 704.

² *Com. Laws*, p. 615, § 5.

³ *Jennings v. McIlroy*, 42 Ark. 236.

⁴ Section 688.

personal, or any interest thereto, of the judgment debtor, not exempt by law, are liable to execution.

If a deed of trust leaves an interest in the trust property in the grantor, such interest may be sold on an execution against him.¹ But before such property can be taken under attachment or execution the officer must pay or tender the mortgagee the amount of the mortgage debt and interest, or deposit the same with the county clerk, payable to order of mortgagee.²

An attachment of mortgaged property, before the mortgage is filed as required by statute, will be superior to the mortgage.³

§ 816. **Colorado.**—When it shall appear that the goods in the hands of the garnishee are mortgaged or pledged, under an order of the court, an execution creditor may tender the amount due the garnishee, when the goods shall be delivered to the officer who holds the execution.⁴

Though the statutes⁵ make all the property owned by the debtor liable to execution, and Code Civil⁶ provides that the court may order property of a defendant capable of manual delivery, in the possession of the garnishee, to be delivered to the sheriff on just terms, having reference to any liens thereon or claims against the same, the equity of redemption in personalty, in possession of a mortgagee after condition broken, is not liable to levy under execution, as only in cases of garnishment, on the plaintiff paying the debt for which the garnishee holds the property, as provided by statute,⁷ can mortgaged property in possession of the mortgagee be reached, and the last-named section does not apply to executions.⁸

¹ *Kennedy v. Nunan*, 52 Cal. 326.

² Civil Code, §§ 2955, 2969.

³ *Beamer v. Freeman*, 84 Cal. 554.

⁴ Rev. Stat. § 1567.

⁵ Rev. Stat. of 1883, § 1835.

⁶ Code of Civil Procedure, § 103.

⁷ Rev. Stat. § 1567.

⁸ *Metzler v. James*, 12 Colo. 322.

§ 817. **Connecticut.**—The equity of redemption, in a mortgage of personalty, may be levied upon; such interest shall be appraised, and the whole or any part thereof may be set off to the creditor. All the proceedings in levying upon the mortgagor's right of redemption shall be in the same manner as by law provided for the levy of execution upon real estate.¹

§ 819. **Delaware.**—A mortgagor in possession is considered the owner of the property before foreclosure, and his interest in land may be sold on execution.²

§ 820. **Florida.**—Equities of redemption shall be subject to levy and sale, upon judgments at common law or upon decree in equity. The court shall order the mortgagee to make oath what amount remains due upon said mortgage.³

§ 821. **Georgia.**—The mortgaged property may be sold subject to the mortgagee's lien. If the mortgage is foreclosed the mortgagee may place his execution in the hands of the officer making the sale and claim the proceeds according to the date of his lien.⁴

§ 822. **Idaho.**—The mortgagor's interest may be attached by his creditors. But before the officer shall be allowed to take the property into his possession the attaching creditor shall tender the amount due to the mortgagee.⁵

§ 823. **Illinois.**—The interest of the mortgagor, before default, may be seized on execution, provided the mortgage contains a stipulation giving possession to the mortgagor until condition broken. The purchaser takes only the rights of the mortgagor.⁶

Where the mortgage gives the mortgagor right of posses-

¹ Gen. Stat. p. 461, § 32; *Dyer v. Cady*, 20 Conn. 563.

² *Cooch v. Gerry*, 3 Harr. 280.

³ Bush Dig. 1872, p. 325, §§ 8, 9, 10.

⁴ Code, §§ 1967, 1968.

⁵ Rev. Stat. p. 662, §§ 5, 6.

⁶ *People v. Johnson*, 15 Ill. App. 153; *Durfee v. Grinnell*, 69 Ill. 371; *Merritt v. Niles*, 25 Ill. 282; *Beach v. Derby*, 19 Ill. 617; *Prior v. White*, 12 Ill. 261; *Holladay v. Bartholomae*, 11 Ill. App. 206; *Spaulding v. Mozier*, 57 Ill. 148; *Lewis v. D'Arcy*, 71 Ill. 648.

sion until default or until maturity of debt, and the mortgagee has a right to declare the debt due and take possession of the mortgaged property upon the happening of a certain event, the mortgagor in possession has an interest subject to execution against the mortgagor. The mere levy of the execution does not at once mature the notes, but only gives the mortgagee the right to declare them due.¹ If the mortgage is suffered to remain in the possession of the mortgagor beyond the time limited in the mortgage for his possession, it renders the mortgage fraudulent and void as to execution creditors of the mortgagor.²

If the mortgagee has taken possession before levy the creditor's remedy is by garnishment of the surplus in the mortgagee's hands after his debt is satisfied.³

The lien of an attachment on personal property is superior to a lien of a prior unrecorded mortgage, although, by the law of a sister State, where all parties reside, a mortgage becomes a lien without recording. The law of the owner's domicile does not control.⁴ But if the mortgagee takes possession he perfects his lien of an unrecorded mortgage, and an attachment then against the mortgagor will not hold.⁵

§ 824. **Indiana.**—In this State it is provided that goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be seized and sold on execution against the person making the pledge, assignment or mortgage, subject thereto, and the purchaser shall be entitled to possession, upon complying with the conditions of the instrument.⁶

An officer is liable in trover for levying on and obtaining goods after their sale by the mortgagee under the power given in the mortgage.⁷

¹ *Beach v. Derby*, 19 Ill. 617; *Simmons v. Jenkins*, 76 Ill. 479.

² *Dunlap v. Epler*, 88 Ill. 82.

³ *Pike v. Colvin*, 67 Ill. 227.

⁴ *Green v. Van Buskirk*, 7 Wall. (U. S.) 139.

⁵ *Giffert v. Wilson*, 18 Ill. App. 214.

⁶ Rev. Stat. of 1881, § 722.

⁷ *Syfers v. Bradley*, 115 Ind. 345.

The purchaser must comply with the conditions of the mortgage in order to take possession of the property.¹

A mortgage of chattels may be levied upon and sold subject to the mortgage to satisfy an execution against the mortgagor, and the officer is entitled to possession of the mortgaged property, even as against the mortgagee, for the purpose of making such sale.²

§ 825. *Iowa*.—The mortgagor of personal property has no such interest therein at common law as can be levied upon and sold, and no lien can be obtained by the process of such levy.³

§ 825*a*. *Statutory Provisions*.—An attachment or execution may be levied on personal property not exempt from execution, covered by a mortgage, when the debt is due, by paying or tendering to the mortgagee the amount of the mortgage debt and interest accrued, or depositing the amount with the clerk of the District Court of the county wherein the mortgaged property is found, payable to the order of the holder of the mortgage. If the debt is not due, the deposit must include interest till the debt is due, not exceeding a period of sixty days after the date specified in the mortgage; whereupon the attaching creditor shall be subrogated to all the rights of the holder of the mortgage. The execution or attaching creditor shall have the right to controvert the statement of indebtedness, if he gives notice in writing at the time of the deposit, and the clerk shall hold such deposit until the matter is determined. If the attaching or judgment creditor fail to sustain his claim against the mortgage, he shall pay to the holder of the mortgage interest upon the debt at the rate of ten per cent. per annum, together with the costs of the proceeding and an attorney's fee of ten per cent. on the amount of the debt. This does not affect the right of any creditor to contest for any reason the validity

¹ *Broadhead v. McKay*, 46 Ind. 595.

² *Sparks v. Compton*, 70 Ind. 393; *Coe v. McBrown*, 22 Ind. 252; *Landers v. George*, 49 Ind. 309; *Olds v. Andrews*, 66 Ind. 147; *Hackleman v. Goodman*, 75 Ind. 202; *Sidener v. Bible*, 43 Ind. 230.

³ *McConnell v. Denham*, 72 Iowa 494; *Campbell v. Leonard*, 11 Iowa 489; *Gordon v. Hardin*, 33 Iowa 550; *Vanslyck v. Mills*, 34 Iowa 375.

of such mortgage, which he may do by levying directly on the mortgaged property. The mortgagee, on written demand of a creditor, his agent or attorney, except in case of the mortgage of exempt property, shall deliver to the creditor a statement under oath showing the nature and amount of the original debt secured by the mortgage, the date and amount of each payment, if any, and an itemized statement of the amount due and unpaid.¹

§ 826. **Kentucky.**—The sheriff may lawfully take possession of personal property mortgaged, and levy upon it, and sell the equity of redemption to a purchaser who obtains possession from the sheriff and has the right to hold it against the mortgagee until a sale is ordered.

A mortgagee holding the legal title, if his debt be due and unpaid, cannot be divested of his possession of the mortgaged property by the mortgagor or any person holding under him by private purchase or execution sale.²

§ 827. **Maine.**—Personal property subject to incumbrance may be attached and sold, if amount of incumbrance is first tendered or paid; and the proceeds of sale on execution are to be applied first to reimburse the attaching creditor for the amount so paid by him to redeem.³ Creditor attaching mortgagor's interest may also file a bill in equity.⁴

The mortgagor's interest may be attached, although the record title stands in the name of the mortgagee.⁵

§ 828. **Maryland.**—A debtor's equitable estate of personality cannot, at law, be seized and sold under execution.⁶ A court of equity will not, however, set aside a sale of such an interest, but, on the contrary, if applied to for that purpose, would decree a ratification of it upon the principle that that

¹ Gen. Acts of 1886, ch. 117. See *Deering v. Wheeler*, 76 Iowa 496. See *Haller v. Parrott* (Iowa), 47 N. W. Rep. 996.

² *Mercer v. Tinsley*, 14 B. Mon. 273.

³ Rev. Stat. ch. 81, §§ 30-39.

⁴ Rev. Stat. ch. 129.

⁵ *Perry v. Somerby*, 57 Me. 552.

⁶ *Martin v. Jewell*, 37 Md. 530; *Rose v. Bevan*, 10 Md. 466.

will be ratified when done, which the court upon application would order to be done.¹

§ 829. **Massachusetts.**—The right to make attachments of mortgaged property is derived from the statutes. The attaching creditor must pay to the mortgagee the amount for which the property is liable.²

The provisions of the statutes require the amount due on the mortgage be paid or tendered to the mortgagee. Such treat the payment so made as a redemption of the property, and provide that the proceeds of the sale shall be first applied to repay the attaching creditor the amount paid by him to redeem the property.³ If the attachment is not made according to the provisions of the statute, the mortgagee can maintain an action against the attaching officer for the damages he has sustained; and it does not matter that the mortgagor was in possession under a stipulation in the mortgage.⁴

§ 830. **Michigan.**—The mortgagor's interest in mortgaged chattels is subject, under the statute,⁵ to levy and sale, and the chattels cannot lawfully be taken by the mortgagee from the possession of the sheriff, while he holds under such levy and in proceedings to sell.⁶

Personal property covered by a mortgage may be taken on attachment against the mortgagor. When execution is levied on mortgaged chattels, sale must be so made as to preserve the mortgagee's lien. The property cannot be sold in parcels, but must be sold all together, subject to the mortgage.⁷

§ 831. **Minnesota.**—It is enacted that where the mortgagee of the chattel mortgaged has not sold the mortgaged goods, or foreclosed the mortgage, the mortgagor has a subsisting

¹ *Harris v. Alcock*, 10 G. & J. 251. Equitable interests of personalty cannot be taken in execution. The course is for the creditor to levy his execution and have it returned, and then go into equity.

² Pub. Stat. ch. 161, § 74 *et seq.*

³ *Cochrane v. Rich*, 142 Mass. 15.

⁴ *Forbes v. Parker*, 16 Pick. (Mass.) 462.

⁵ Com. Laws, § 6401.

⁶ *Nelson v. Ferris*, 30 Mich. 497.

⁷ *King v. Hubbell*, 42 Mich. 597.

interest of redemption which is subject to the claims of the mortgagor's creditors, which may be reached by garnishment.¹

Thus, where goods were seized by attachment against the mortgagor while in the rightful possession of the mortgagee, the latter in a case against officer can recover only the value of his interest in the goods. Whether taken properly by any other way, as, for instance, by levy upon the mortgaged property in the rightful possession of the mortgagee, may well be doubted.²

§ 832. **Mississippi.**—The right of a grantor in a deed of trust of personal property therein is not a subject of seizure and sale under execution at law. Equities and rights of redemption are not subject to execution at common law, nor has that rule been changed by statute in this State.³

§ 833. **Missouri.**—Equitable interests in personal chattels are not vendible under execution.⁴ Thus, where a mortgagor continues in possession of the property, and a creditor sues out an execution against the mortgagor and sells his interest in the mortgaged property, it is held that no interest passes by the sheriff's sale. The court says: "It is against policy that uncertain interests of a debtor in property should be exposed to sale. Experience shows that such sales generally result in great sacrifice of his property, and no satisfaction is made of his debts."⁵ And a mortgagor in possession by the consent of the mortgagee has no interest subject to levy.⁶

§ 834. **Nebraska.**—When a chattel mortgage is given to secure a *bona fide* debt, and the mortgagee has taken posses-

¹ Gen. Stat. 1878, ch. 39, § 8; ch. 66, § 183.

² *Becker v. Dunham*, 27 Minn. 32.

³ *Thornhill v. Gilmer*, 4 Sm. & M. 153; *Wolfe v. Dowell*, 13 Sm. & M. 103. See, also, *Henry v. Fullerton*, 13 Sm. & M. 631; *Commercial Bank v. Waters*, 10 Sm. & M. 559; *Boarman v. Catlett*, 13 Sm. & M. 149; *Harmon v. James*, 7 Sm. & M. 111.

⁴ *Boyce v. Smith*, 16 Mo. 317; *Sexton v. Monks*, 16 Mo. 156.

⁵ *Yeldell v. Stemmons*, 15 Mo. 443. See, also, *Dean v. Davis*, 12 Mo. 112.

⁶ *King v. Bailey*, 8 Mo. 332.

sion of the property, or has a right to do so under the provisions of the mortgage, a judgment creditor of the mortgagor cannot, without the consent of the mortgagee, levy upon the mortgaged property and sell it under execution.¹

§ 834*a*. **Nevada.**—Mortgaged property may be seized under attachment or execution against mortgagor, and surplus over mortgage debt applied to payment of judgment against mortgagor; but the possession thereof shall not be taken from mortgagor or mortgagee unless full payment of the mortgagee's demand be first made, which, if done by the attaching or execution creditor of the mortgagor, shall entitle him to hold such personal property and the possession thereof under his levy, for repayment to him of the amount so paid to the mortgagee, with interest as provided in the mortgage, in addition to his own individual demand.

The officer levying any execution is authorized to sell the mortgaged property for the amount of the mortgage demand, in addition to the amount of the execution, and out of the proceeds of the sale to first satisfy such mortgage demand. In case of levy of attachment, when the amount of the mortgage debt is not paid to the mortgagee, the officer may sell the property, subject to the rights of the mortgagee under the mortgage, and the purchaser shall take such property subject to such rights, and to the possession of the parties to the mortgage.²

§ 835. **New Hampshire.**—Any personal property not exempt from attachment and subject to any mortgage may be attached as the property of the mortgagor; but the attaching creditor must tender the amount due the mortgagee when the creditor or officer demands of the mortgagee an account under oath of the amount due.³ And the custody of the property shall remain in the possession of the officer until the mortgagee renders an account. If the mortgagee fails to render

¹ Chicago Lumber Co. v. Fisher, 18 Nebr. 334.

² Gen. Laws, tit. "Attachment."

³ Rev. Stat. ch. 224, §§ 17, 18.

such an account, the property shall be discharged from the mortgage.¹

It is also provided that such property shall be subject to execution in the same manner as it is attached, under the same regulations.²

§ 836. **New Jersey.**—Goods subject to a chattel mortgage providing that, in default of payment of the debt secured, the mortgagee may take possession of the property, but, until such default, the mortgagor shall remain in quiet and peaceable possession and full and free enjoyment of the same, are subject to attachment for the debts of the mortgagor before maturity of the debt secured, and cannot be claimed by the mortgagee as his property.³

But a mortgagor's interest is not subject to seizure upon execution against him when the mortgagee is in possession or entitled to possession.⁴

§ 837. **New York.**—Before default or taking possession by the mortgagee the mortgagor has an interest in the mortgaged property which may be levied upon by execution against him, and will authorize the officer to take the property into his possession and sell it without reference to the mortgage, and the remedy of the mortgagee in such case is to follow the property into the hands of the purchaser and require its delivery to him, or the payment of his mortgage debt.⁵ The mortgagor has an interest in the property which is subject to seizure by a receiver appointed in proceedings supplementary to execution.⁶

¹ *Kimball v. Morrison*, 40 N. H. 117.

² Chapter 236, §§ 3-5.

³ *Blauvelt v. Fechman*, 48 N. J. L. 430; *Woodside v. Adams*, 40 N. J. L. 417; *Doughten v. Gray*, 2 Stock. 323.

⁴ *Miller v. Pancoast*, 29 N. J. L. 250.

⁵ *Hall v. Sampson*, 35 N. Y. 274; *Hull v. Carnley*, 11 N. Y. 50; 17 N. Y. 202; *Goulet v. Asseler*, 22 N. Y. 228; *Hathaway v. Brayman*, 42 N. Y. 322; *Bailey v. Burton*, 8 Wend. 339; *Bank v. Crary*, 1 Barb. 542.

⁶ *Manning v. Monaghan*, 28 N. Y. 585.

After forfeiture the mortgagor has no interest in the property which can be sold on execution against him. *Fairbanks v. Bloomfield*, 5 Duer 434; *Champlin v. Johnson*, 39 Barb. 606; *Bates v. Ripp*, 3 Keyes 210; *Hall v. Samson*, 19 How. Pr. 481.

§ 837*a*. **North Dakota.**—All goods, chattels, money and other property, or any interest therein, and all other property not capable of manual delivery, shall be liable to execution.¹

Thus, the interest of the pledgor of stock of a corporation "in pool," which has been transferred to a trustee by a pool, by indorsement only, may be seized and sold under execution.²

But before the mortgaged property is seized the officer must pay or tender to the mortgagee the amount due him. In an action by a mortgagee against an officer who had seized on a part of the mortgaged property under execution without depositing the amount of the mortgage debt, the mortgagee's recovery, if he is entitled to recover, must be limited to the value of the property taken and compensation for time and money spent in the pursuit of it.³

§ 838. **Ohio.**—The interest of the mortgagor in chattels mortgaged of which he is in possession, after condition broken, may be attached, and the levy of the order of attachment and seizure of the property by the officer charged with the execution of the order, create a lien in favor of the attaching creditor upon the interest of such mortgagor.⁴

§ 839. **Oregon.**—The interest of a pledgor of personal property, pledged with a limited power to sell for the protection of the pledgee, may be levied upon and sold under an execution against the pledgor. The pledgor holds the legal title to the property pledged and not merely an equitable interest.⁵

§ 840. **Pennsylvania.**—In the case of a pawn or pledge, there is a special property in the pawnee. It is liable to be sold on execution against the pawnor, but subject to the

¹Civil Code, § 314.

²*Vancise v. Nat. Bank*, 33 N. W. Rep. 897.

³*Keith v. Haggart*, 33 N. W. Rep. 465; Civil Code, §§ 743, 756.

⁴*Carty v. Fenstermaker*, 14 Ohio St. 457; *Morgan v. Spangler*, 20 Ohio St. 38.

⁵*Williams v. Gallick*, 11 Oreg. 337.

rights and interests of the pawnee. The taking of property out of the possession of the pawnee by an officer and sold, does not divest his property, and is no relinquishment of his lien, and a *bona fide* purchaser from an officer's vendee takes it subject to the pawnee's lien.¹

The owner of the reversionary title to chattels sold on condition has no right of action against an officer who levies on the chattels while in the rightful possession of the vendee.²

§ 841. **Rhode Island.**—Personal estate, when mortgaged and in the possession of the mortgagor, and while the same is redeemable at law or in equity, may be attached on mesne process against the mortgagor, or execution may be levied upon it in the same manner as upon other personal estate.³

But an attachment laid on a vessel under the law of a State cannot interfere with the rights of mortgagees under a prior mortgage of a vessel duly recorded according to the laws of the United States.⁴

§ 842. **South Carolina.**—A chattel mortgage operates as a transfer of title, and the stipulation permitting the mortgagor to retain possession until condition broken, is personal to him and cannot be assigned; hence, the mortgagee, before condition broken, may maintain action by recovering against the purchaser at sheriff's sale of the mortgaged chattels.⁵

§ 842a. **South Dakota.**—The mortgagor's interest in personal property mortgaged may be seized on attachment or execution. But before the writ is levied on the property the officer must pay or tender to the mortgagee the amount due him.⁶ In an action by a mortgagee against an officer who had seized on a part of the mortgaged property under execution without depositing the amount of the mortgage

¹ Reichenbach v. McKean, 95 Pa. St. 432.

² Dixon v. White S. M. Co., 128 Pa. St. 397.

³ Pub. Stat. ch. 208, § 4.

⁴ Howe v. Tefft, 15 R. I. 477.

⁵ Levi v. Legg, 23 So. Car. 282; Spriggs v. Camp, 2 Spears 181; Bellune v. Wallace, 2 Rich. 80.

⁶ Civil Code, §§ 743, 756.

debt, the mortgagee's recovery, if he is entitled to recovery, must be limited to the value of the property taken and compensation for time and money spent in the pursuit of it.¹

§ 843. **Tennessee.**—Equitable interests in chattels are not subject to execution at law.² A creditor cannot, upon execution and attachment, take property held by another as a pledge without first discharging the debt for which it is held.³

§ 844. **Texas.**—Mortgaged property is liable to be sold under execution against the mortgagor, subject to the lien of the mortgage, although it contains a power authorizing the sale of the property by the trustee upon default of payment by the mortgagor.⁴

§ 844a. **Utah Territory.**—Personal property mortgaged may be taken on attachment on an execution at the suit of a creditor against the mortgagor, and the mortgagor's interest sold. But before such seizure the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest.⁵

§ 845. **Vermont.**—Any personal property not exempt from attachment, subject to any mortgage, pledge or lien, may be attached, taken on execution and sold in the same manner as other personal property, except as to certain conditions. The creditor can pay the amount due and hold the lien free.⁶

If a creditor of the mortgagor attaches mortgaged property such creditor takes only the interest of the mortgagor in the chattel, and holds it exposed to a forfeiture for breach of condition by mortgagor. After breach of condition the mortgagor has no attachable interest in the chattel.⁷

A creditor, on becoming an assignee of the mortgage, attached property covered by the mortgage, which was

¹ *Keith v. Haggart*, 33 N. W. Rep. 465.

² *Carnes v. Apperson*, 2 Sneed 562.

³ *National Bank v. Pettit*, 9 Heisk. 447.

⁴ *Wootton v. Wheeler*, 22 Tex. 338; *Gillian v. Henderson*, 12 Tex. 47; *Ballard v. Anderson*, 18 Tex. 377; *Wright v. Henderson*, 12 Tex. 43.

⁵ *Laws of 1884*, pp. 28-32.

⁶ *Rev. Stat.* §§ 1180-1186.

⁷ *Norris v. Sowles*, 57 Vt. 360.

exempt; held, that the mortgagor could not recover it by action of replevin, some of the property being attachable and some not.¹

§ 846. **Washington.**—The interest of the mortgagor, before condition broken, may be seized under execution and attachment, and sold subject to the lien of the mortgagee.²

§ 847. **Wisconsin.**—A mortgagor of chattels has an interest in the mortgaged property until it is extinguished by foreclosure, which may be seized and disposed of by his creditors; but such interest is subservient to the paramount interest of the mortgagee. The creditor of the mortgagor cannot deprive the mortgagee of his possession or his right of possession so as to control and dispose of the property regardless of such right.³

Where an officer, by virtue of an execution against the goods of a mortgagor of personal property, levies upon and sells the entire property instead of the mortgagor's interest, such a levy and sale are illegal acts, for doing which the writ will furnish no jurisdiction, and the mortgagee may maintain an action of replevin for the same.⁴

¹ *Denno v. Nash*, 60 Vt. 334.

² *Gen. Laws*, p. 105, § 5.

³ *Cotton v. Marsh*, 3 Wis. 221; *Cotton v. Watkins*, 6 Wis. 629.

⁴ *Frisbee v. Langworthy*, 11 Wis. 375.

CHAPTER XVII.

WRONGFUL SALE AND REMOVAL OF THE
PROPERTY.

ARTICLE I.—STATUTORY PROVISIONS.

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§ 848. **In General.**—In most of the States statutes have been enacted making it a penal offense to sell or remove mortgaged property without the consent of the mortgagee. The penalty is generally by fine or imprisonment.

§ 849. **Alabama.**—Any person who sells or conveys any personal property upon which he has given a written mortgage, lien or deed of trust, and which is then unsatisfied in

whole or in part, without first obtaining the consent of the lawful holder thereof to such sale or conveyance, is guilty of a misdemeanor, and upon conviction shall be fined not exceeding \$500, and may also be imprisoned in the county jail or sentenced to hard labor for the county not exceeding six months, one or both, at the discretion of the jury.¹

Though a mortgagee is bound civilly by an assignment of the mortgage, executed by another as his agent, his silent partner being present at the time, and by the representations of the partner that the mortgage debt was the only claim held by the firm against the property, he cannot be held criminally unless it be shown that he knew or had knowledge of the transfer and representations.²

An indictment for removing mortgaged property charged that the mortgage lien covered two cows and two calves; the mortgage was given for two cows; it was held no variance, as the offspring of mortgaged animals, which are born after the making of the mortgage, are subject to the lien of such incumbrance.³

§ 850. **Instances.**—Under the Code, Sec. 4353, a conviction cannot be had for selling or removing mortgaged property, unless the mortgagor sells or removes the property for the purpose of hindering, delaying or defrauding the mortgagee. If he removes and sells it for the purpose of raising money to pay the mortgage debt, honestly believing that the mortgagee assents to such removal and sale, and having a just cause so to believe, he is not guilty.⁴

The word "convey," as used in the Code, Sec. 4354, making it a misdemeanor to sell or convey personal property upon which there is a written lien or mortgage, includes a transfer of property by exchange.⁵

Valid equitable liens and mortgages are as much within

¹ Civil Code, §§ 4353, 4354.

² *Foster v. State*, 88 Ala. 182.

³ *Dyer v. State*, 88 Ala. 225.

⁴ *Atwell v. State*, 63 Ala. 61.

⁵ *Johnson v. State*, 69 Ala. 593.

the provisions of the statutes which make it criminal—the removal or sale of property on which one has a lien—as are those valid at law.¹

§ 851. **Burden of Proof.**—Where, in an action for the conversion of cotton claimed under a crop mortgage, there was conflicting evidence as to whether the cotton claimed was part of the mortgagor's crop, an instruction that it was incumbent with the plaintiff to satisfy the jury that the cotton in question was raised by the mortgagor was proper.²

§ 852. **Unplanted Crops.**—A mortgage of an unplanted crop conveys an equitable title which will support an action on the case by the mortgagee against a third person, who, having actual or constructive notice of the mortgage, receives and sells the crop.³

§ 853. **Arkansas.**—Any person or persons who shall remove beyond the limits of the State, or of any county wherein the lien is recorded, property upon which there is a lien, by virtue of a mortgage, deed of trust, or who shall sell, barter or exchange, or otherwise dispose of any such property without the consent of the person who has the lien, or shall secrete the same or any portion thereof, shall be deemed guilty of felony and subject to an indictment, and upon conviction thereof shall be sentenced to hard labor in the county jail and penitentiary-house of the county for a period of not less than one nor more than two years, at the discretion of the jury trying the same.⁴

§ 854. **Instances.**—Actual recording of the instrument creating the lien is not necessary to make it a felony for one to remove, sell, barter, or otherwise dispose of the mortgaged property. Filing in the recorder's office as required by the statute is sufficient. An indictment charging that the accused did sell, barter, or otherwise dispose of the mortgaged prop-

¹ *Varnum v. State*, 78 Ala. 28.

² *Woolsey v. Jones*, 84 Ala. 88.

³ *Leslie v. Hinson*, 83 Ala. 266; *Whittleshoffer v. Strauss*, 83 Ala. 517.

⁴ Acts of 1874-5, pp. 129, 130.

erty is bad for uncertainty. The manner of the disposal must be specified.¹

The mortgagee may, by proper action, subject the proceeds of the sale of the mortgaged property, sold by one who has purchased it from the mortgagor and sold it, to the payment of his mortgage debt.²

A cropper on shares has such an interest in the crop as is a subject of mortgage, and for the selling of which when mortgaged, and the mortgage being recorded, he may be guilty of a felony. To find him guilty it is not necessary that the jury find that he sold it with the felonious intent to deprive the mortgagee of his debt.³ The indictment for selling mortgaged property must show not only that the mortgage was recorded or filed with the clerk as required, but also that it has been acknowledged; and it would be better to state the name of the purchaser, or that his name was unknown.⁴

§ 855. **California.**—If a mortgagor voluntarily removes or permits the removal of the property mortgaged from the county in which it was situated at the time of the execution of the mortgage, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt be not due.⁵

§ 856. **Colorado.**—If the mortgagor sells, transfers or incumbers the mortgaged property during the existence of the mortgage, it is deemed a larceny of such property, unless he shall fully advise the person with whom he is negotiating of the fact of the prior lien, and also fully apprise the mortgagee of the intended sale. If the mortgagor transfers, conceals or carries away the mortgaged property without the written consent of the mortgagee, he is deemed guilty of a misdemeanor, and may be fined not less than twice the value

¹ *Cooper v. State*, 37 Ark. 412.

² *Titsworth v. Spitzer*, 42 Ark. 310.

³ *Beard v. State*, 43 Ark. 284.

⁴ *State v. Harberson*, 43 Ark. 378.

⁵ Code of 1876, § 7966.

of the property, or by imprisonment in the county jail not exceeding one year, or both, at the discretion of the court.

Any person having conveyed any chattels to another by mortgage, who shall, during the lien, sell the said property to a third person for a valuable consideration, without informing him of the prior lien, shall forfeit and pay to the purchaser twice the value of such property so sold, which forfeiture may be recovered in an action of debt in any court having jurisdiction.¹

§ 857. **Connecticut.**—Whoever, with a fraudulent intent to place mortgaged personal property beyond the control of the mortgagee, removes or conceals, or aids or abets in removing or concealing the same, and mortgagor of such property who assents to such removal or concealment, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in jail not exceeding six months. If any mortgagor of personal property sells or conveys the same, or any part thereof, without the written consent of the mortgagee, and without informing the person to whom he sells or conveys that the same is mortgaged, he shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in jail not exceeding six months.²

§ 858. **Trover.**—Where personal property mortgaged to secure the payment of a debt payable on demand is left in the possession of the mortgagor, an unqualified sale by him of the entire property is a wrongful conversion, for which trover will lie.³

§ 860. **Delaware.**—If any mortgagor, without the consent of the mortgagee, removes the mortgaged property from the county where it is situated, or in which it was at the time of the execution of the mortgage, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum equal to the value of the property removed, and

¹ Gen. Laws of 1877, p. 123, §§ 129, 131, 132.

² Laws of 1877, ch. 53.

³ *Ashmead v. Kellogg*, 23 Conn. 70.

shall also be imprisoned for a term not exceeding one year.¹

§ 861. **Florida.**—If any mortgagor of personal property, or other person, shall, with fraudulent intent, make arrangements, endeavor or attempt to remove the same beyond the limits of the judicial circuit in which the property was at the time of the execution of the mortgage, so as to impair the rights, interests, or remedies of the mortgagee, or the assignee of such mortgage, it shall be competent for the mortgagee, or any person interested in the mortgage, upon making an affidavit of the fact before a judge of the Circuit Court, or before any justice of the peace, or the clerk of the Circuit Court, to obtain a writ of attachment, to be directed to any constable or sheriff, requiring him to attach and take into his custody the property so removed or attempted to be removed; or, if such constable or sheriff cannot be had, then any other indifferent person specially delegated under the hand and seal of the judge, justice or clerk issuing such attachment; such attachments shall run and have full force and effect in every county of the State. When the jury find that a removal was intended, they shall ascertain the amount of damages and render a verdict for the same, whether the debt is due or not, and execution issued as in other cases.

Such a mortgagor so offending may be deemed guilty of felony, and upon conviction be confined in the State prison at hard labor for not less than three nor more than twelve months, or fined not less than five hundred nor more than one thousand dollars, at the discretion of the court.²

§ 862. **Georgia.**—No person, after having executed a mortgage deed to personal property, shall be permitted to sell or otherwise dispose of the same with intent to defraud the mortgagee, unless the consent of the mortgagee be first obtained, before payment of the indebtedness for which the mortgage deed was executed; and if any person shall violate

¹ Laws of 1877, ch. 477, § 4; Gen. Laws, vol. 15, ch. 477, § 4.

² Gen. Laws, § 3015.

the provisions of this section, and loss thereby is sustained by the holder of the mortgage, the offender shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in double the sum or debt which said mortgage was given to secure; and upon the failure to pay said fine immediately, the person so convicted shall be imprisoned in the common jail for a period of not less than six months nor more than twelve. When the fine has been imposed and collected, one-half shall be paid to the holder of the mortgage, and the payment shall extinguish the debt to secure which the mortgage was executed, and the remaining half shall be paid over to the county treasury of the county in which such conviction was had.¹

§ 863. **Instance.**—The loss mentioned in the statute does not necessarily refer to the loss of the debt, or any part of it; but if there be a fraudulent disposition of the property mortgaged, and a loss of the mortgagee's security or of the value of his security results from it, the fraud is an offense; or if the mortgagee sustains loss by reason of having to incur expense to follow the property to discover it in consequence of the fraudulent sale or fraudulent disposition, is all the loss the statute requires in order to make the mortgagor punishable. If the mortgagor had other property, there would be a violation of the law.²

§ 864. **Illinois.**—Any person so conveying any personal property who shall, during the existence of the title or lien created by such instrument, sell the same or any part thereof to another person for a valuable consideration, without informing him of the existence of such conveyance, shall forfeit and pay to the purchaser twice the value of the property so sold, which sum may be recovered by such purchaser, in an action of debt, in any court of competent jurisdiction, or before a justice of the peace, if within his jurisdiction.³

¹ Code, § 4600.

² *Coleman v. Allen*, 79 Ga. 637.

³ Rev. Stat. ch. 95, § 6.

Any person having so conveyed any personal property who shall, during the existence of such title or lien, sell, transfer, conceal, take, drive or carry away, or in any manner dispose of such property or any part thereof, or cause or suffer the same to be done without the consent of the holder of such incumbrance, shall be guilty of a misdemeanor, and on conviction may be fined in a sum not exceeding twice the value of the property so sold or disposed of, or confined in the county jail not exceeding one year, or both, at the discretion of the court.¹

§ 865. **Indiana.**—Any person having mortgaged his personal property, who shall, during the existence of the lien, sell or transfer to any person, without informing him of the lien, or who shall take, drive or carry away, in violation of his agreement contained in the mortgage, and without the consent of the mortgagee, any of the property, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not to exceed two hundred dollars, in the discretion of the court or jury trying the cause.²

§ 866. **Iowa.**—If any mortgagor of personal property, while his mortgage of it remains unsatisfied, willfully destroys, conceals, sells, or in any manner disposes of the property covered by such mortgage, without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny and be punished accordingly.³

§ 867. **Instances.**—Under the statute the mortgagor may fully use and control the property, provided he does not impair the security of the mortgagee; and the sale of the equity of redemption, or the execution of a subsequent mortgage, which, in legal contemplation, amounts to the same thing, does not render such transaction void. So, a second mortgage upon chattels, though made without the consent of the first mortgagee, is not rendered void by the statute

¹ Rev. Stat. ch. 95, § 7.

² Rev. Stat. § 1954.

³ Rev. Code 1880, § 3895.

which makes the mortgagor guilty of larceny for disposing of such property without the consent of the mortgagee.¹

When a mortgagor sells mortgaged property, the mortgagee's lien is not impaired thereby, and he can follow the property and recover it. This lien cannot be divested by any payment short of a payment of the mortgage debt. The mortgagee's remedy is against the mortgagor and against the property.²

An indictment for larceny growing out of the sale of mortgaged property must aver that the mortgage was unsatisfied at the time of the offense charged.³

§ 868. **Purchasing Mortgaged Chattels.**—To purchase mortgaged chattels is not a criminal offense.⁴

§ 869. **Kansas.**—Any mortgagor of personal property who shall injure, destroy, sell or dispose of such property, or any part thereof, for the purpose of defrauding the mortgagee or his or her assigns, or shall conceal such property, or any part thereof, with the intent to hinder, delay or defraud such mortgagee or his or her assigns, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period not to exceed six months or by a fine of not less than fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment.⁵

§ 870. **Louisiana.**—Chattel mortgages are not known to the law of Louisiana.

Machinery attached to a plantation and used for plantation purposes, though included in a mortgage, if purchased and removed, even during the pendency of a suit to enforce the mortgage, is withdrawn from the operation of the mortgage. When machinery is removed from a plantation it again becomes a movable, and as such could not be suscep-

¹ *Tootle v. Taylor*, 64 Iowa 629.

² *Waters v. Bank*, 65 Iowa 234.

³ *State v. Gustafson*, 50 Iowa 195.

⁴ *McDonald v. Norton*, 72 Iowa 652.

⁵ *Com. Laws*, § 2036.

tible to a mortgage, even if the purchase was in bad faith—that is, purchased with knowledge of the mortgage.¹

§ 871. **Maine.**—Any person having executed a chattel mortgage who shall, during the existence of such instrument, sell, transfer, conceal, remove, or carry, or drive away said mortgaged property, or any part thereof, or cause the same to be done, without the consent of the mortgagor or his assigns, and with the intent to defraud, shall be punished by fine and imprisonment.²

§ 872. **Maryland.**—Any person who, after having conveyed any chattels to another by chattel mortgage, shall, during the existence of such conveyance or lien created by such mortgage, sell the said property or conceal it, or any part thereof, without first obtaining the consent of the mortgagee of the property to such sale or removal, shall be guilty of a misdemeanor.³

§ 873. **Massachusetts.**—Whoever, with a fraudulent intent to place mortgaged personal property beyond the control of the mortgagee, removes or conceals, or aids or abets in removing or concealing the same, and any mortgagor of such property who assents to such removal or concealment, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the jail not exceeding one year. If a mortgagor of personal property sells or conveys the same, or any part thereof, without the written consent of the mortgagee, and without informing the person to whom he sells or conveys that the same is mortgaged, he shall be punished by fine not exceeding one hundred dollars or by imprisonment in the jail not exceeding one year.⁴

§ 874. **Instances.**—A person who, at the request of the mortgagor in possession, merely removes certain mortgaged chattels from one place to another, against the orders of the

¹ *Weill v. Thompson*, 24 Fed. Rep. 14; *Bank v. Knapp*, 22 La. Ann. 117.

² Rev. Stat. ch. 126, §§ 1-4.

³ Code of 1888, art. 27, § 111.

⁴ Gen. Stat. ch. 161, §§ 61, 62.

mortgagee, is not guilty of conversion, although the mortgage provides that the chattels should not be removed without the consent of the mortgagee, and such consent was not given.¹

Where the indictment describes the property as having been mortgaged by the defendant to a person named, and by a deed of specific date, and alleges that the jurors cannot more particularly describe it, this last allegation includes the one of greater particularity in the description, if it would otherwise have been required.²

A mortgagor of personal property, who sells it, either with the written consent of the mortgagee or after informing the buyer that it is mortgaged, is not punishable under the statute.³

An indictment which avers in one count that the defendant removed, concealed, aided and abetted in removing and concealing the mortgaged personal property with fraudulent intent to place it beyond the control of the mortgagee, the averment of aiding and abetting is superfluous, and no evidence can be introduced or conviction had on such an indictment, which would not be competent, if that averment were omitted.⁴

§ 875. **Michigan.**—If any person who shall have made or executed any mortgage or conveyance intended to operate as a mortgage of goods and chattels, shall fraudulently embezzle, remove, conceal or dispose of any such goods and chattels mortgaged or conveyed as aforesaid, with intent to injure or defraud the mortgagee or assignee of said mortgage or conveyance, he shall be guilty of a misdemeanor, and punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or both, in the discretion of the court.⁵

¹ *Metcalf v. McLaughlin*, 122 Mass. 84.

² *Commonwealth v. Strangford*, 112 Mass. 289.

³ *Commonwealth v. Damon*, 105 Mass. 581.

⁴ *Commonwealth v. Wallace*, 108 Mass. 12.

⁵ *How. Stat.* § 9187.

§ 876. **Instances—Replevin.**—A chattel mortgagee's agent, for the purpose of foreclosing, who has taken possession of the mortgaged goods with the mortgagor's consent, and kept them at his own expense while arranging for their sale, may replevy them in his own name from the mortgagor who surreptitiously takes them from his possession.¹

In replevin by mortgagees of lumber sold by them to partners as individuals, and turned in to the firm in payment of the purchase-price of an interest in the partnership and accepted as such, it is immaterial what disposition the partners made between themselves of the business of the firm subsequent to the bringing of the suit, and testimony to that point is properly rejected.²

§ 877. **Minnesota.**—If any person, having conveyed any article of personal property by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, take, drive or carry away, or in any way or manner dispose of said property, or any part thereof, with intent to defraud, or cause or suffer the same to be done without the written consent of the mortgagee of said property, he shall be deemed guilty of a misdemeanor, and shall be liable to indictment; and on conviction thereof shall be punished by fine not less than twice the value of the property so sold or disposed of, or confined in the county jail not exceeding one year, or both, at the discretion of the court, and until the fine and all costs of such prosecution are paid.³

§ 878. **Instances.**—The intent to defraud under the statute is an intent to defraud the mortgagee therein named. Such intent is an essential ingredient in the offense defined by that section, so that an indictment under it, alleging no intent to defraud, except one to defraud some third person other than the mortgagee, is fatally defective.⁴

The allegation that the defendant sold and disposed of the

¹ *Eldridge v. Sherman*, 70 Mich. 266.

² *Cass v. Gunnison*, 68 Mich. 147.

³ Gen. Stat. ch. 39, § 14.

⁴ *State v. Ruhnke*, 27 Minn. 309.

property to one party named, and divers other persons whose names were to the grand jury unknown, charges only one offense.

A growing crop of grain is personal property within the meaning of the statute.¹

§ 879. **Removing Out of the State.**—To take mortgaged property out of the State is a breach of the condition prohibiting removal.²

§ 880. **Mississippi.**—If any person shall move or cause to be removed to any place beyond the jurisdiction of this State any personal property, which shall, at the time of such removal, be under written pledge, or mortgage, or deed of trust, or lien by judgment in this State, with intent to defraud the pledgee, mortgagee, trustee, *cestui que trust*, or judgment creditor, said person shall be deemed guilty of a misdemeanor; and upon conviction thereof before a court of competent jurisdiction shall be fined not more than one thousand dollars, or imprisoned in the county jail not more than twelve months, or punished by both such fine and imprisonment, at the discretion of the court.

Any person who shall remove or cause to be removed, or aid or assist in removing from the county in which it may be, any personal property which may be the subject of a pledge, mortgage, deed of trust, lien of a lessor of lands, or lien by judgment or otherwise, of which such party has notice, without the consent of the holder of such incumbrance or lien, or who shall conceal or secrete such property, and shall not immediately discharge such incumbrance or lien, shall, upon conviction, be imprisoned in the county jail not more than one year, or be fined not exceeding the value of the property, or both.³

§ 881. **Instance.**—The offense of removing from the county property subject to a lien, without immediate discharge of

¹ State v. Williams, 32 Minn. 537.

² King v. Wright, 36 Minn. 128.

³ Code of 1880, §§ 2908, 2909.

same as defined under the Code, is not committed by a mere sale to one who afterwards removes the property from the county.

Under the Code defining the offense of removing from the county property subject to an incumbrance without immediate discharge of the same, an affidavit which fails to state that defendant did not immediately discharge the lien charges no offense.¹

§ 882. *Missouri*.—Every mortgagor or grantor in any chattel mortgage or trust deed of personal property who shall sell, convey or dispose of the property mentioned in said mortgage or trust deed, or any part thereof, without the written consent of the mortgagee or beneficiary, and without informing the person to whom the same is sold or conveyed that the property is mortgaged or conveyed by such deed of trust; or who shall injure or destroy such property, or any part thereof, or aid or abet the same, for the purpose of defrauding the mortgagee, trustee or beneficiary, or his heirs or assigns, or shall remove, or conceal, or aid or abet in removing or concealing such property, or any part thereof, with intent to hinder, delay or defraud such mortgagee, trustee or beneficiary, his heirs or assigns, shall be deemed guilty of a misdemeanor.²

§ 883. *Instance*.—If a mortgagor of chattels sends them out of the State to one who sells them with knowledge of the mortgage, the mortgagee may maintain trover against the person selling.³

§ 884. *Montana*.—Any mortgagor or agent, servant or employe of any mortgagor of personal property, who shall, during the time such mortgage remains in force and virtue, destroy, conceal, sell, or otherwise dispose of the property mortgaged, or who shall remove said property from the county in which said mortgage is recorded, without the

¹ Polk v. State, 65 Miss. 433.

² Rev. Stat. § 1341.

³ Lafayette Co. Bank v. Metcalf, 29 Mo. App. 384.

written consent of the mortgagee or assignee of the mortgage, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, at the discretion of the court.¹

Any person having conveyed goods or chattels, or any article of personal property, to another, by mortgage, who shall, during the existence of the lien or title created by such mortgage, sell the said goods, chattels or personal property, or any part thereof, to a third person, for a valuable consideration, without informing him of the existence and effect of such mortgage, shall forfeit and pay to the purchaser twice the value of such property so sold, which forfeiture may be recovered in an action of debt in any court having jurisdiction thereof, or if the amount claimed does not exceed one hundred dollars, before any justice of the peace.²

§. 885. **Nebraska.**—Any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so mortgaged, to any person or body corporate, without first procuring the consent of the mortgagee of the property to such sale, transfer or disposal, or shall remove, permit or cause to be removed, said mortgaged property, or any part thereof, out of the county within which such property was at the time such mortgage was given on it, with intent to deprive the mortgagee of his property, without first obtaining the consent in writing of the mortgagee of such property to such removal, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for a term not less than one year and not exceeding ten

¹ Laws of 1876, p. 36, § 1.

² Code of 1872, ch. 48, p. 52, § 6.

years, and fined in a sum not less than one hundred dollars, or both.¹

§ 886. **New Hampshire.**—No mortgagor of personal property shall sell or pledge any property by him mortgaged, without the consent of the mortgagee, in writing, upon the mortgage, and on the margin of the record thereof, in the office where it is recorded. No mortgagor shall execute any second or subsequent mortgage of personal property while the same is subject to a previously-existing mortgage, given by such mortgagor, unless the fact of the existence of such mortgage is set forth in the subsequent mortgage.

If any mortgagor shall be guilty of any offense against either of the above provisions, he shall be fined double the value of the property so wrongfully sold, pledged or mortgaged, one-half to the use of the party injured and the other half to the use of the county.²

§ 887. **Instances.**—In a prosecution for the sale of mortgaged property contrary to the provisions of the statute, the value of the property sold at the time of the sale must be alleged in the indictment and found by the jury.³

The sale of chattels by the mortgagor, with the consent of the mortgagee, will convey a good title to the purchaser, even though such consent be not in writing, or if it be so, though it be not entered or indorsed upon the margin of the record of the same.⁴

The statute requires the written consent of the mortgagee of chattels to justify their sale by the mortgagor; so, a verbal consent of the former is no answer to an indictment, under the statute, against the mortgagor, for sale of such property.⁵

§ 888. **New Jersey.**—Every chattel mortgage shall vest in the mortgagee or owner thereof the right to the possession

¹ Laws of 1889, p. 383; Laws of 1885, p. 108. The laws of 1877 are unconstitutional. Ex parte Tromason, 16 Nebr. 268.

² Gen. Stat. ch. 137, §§ 13, 14, 15, 16.

³ State v. Ladd, 32 N. H. 110.

⁴ Roberts v. Crawford, 54 N. H. 532.

⁵ State v. Plaisted, 43 N. H. 413.

of the chattels therein described, so far as may be necessary for the purpose of preventing the removal thereof out of the county wherein they did lie at the time of the execution or delivery of such mortgage, and of recovering such chattels in case the same shall have been removed out of such county.

When such chattels shall be so removed by any party and recovered by the mortgagee or owner of the mortgage by means of legal proceedings, the court in which such proceedings are had may regulate the disposition of such chattels and prescribe such terms for the possession thereof by the mortgagee or other person interested therein as will protect the rights of such mortgagee or owner of such mortgage.¹

§ 889. **Instance—Waiver of Forfeiture.**—One in possession of certain premises, as lessee, executed to his lessor a chattel mortgage on a quantity of goods on the leased premises to secure a debt payable in two years, the mortgage providing that if any goods were removed from the premises the mortgagee might enter and take possession and sell the same. During the first year of the tenancy the lessor gave notice to the lessee to quit at the end of the year, and at that time the lessee left the premises, taking with him the goods mortgaged, the mortgagee standing by and making no objection. It was decided that, by such acquiescence, the mortgagee had lost his right to insist on the forfeiture for the removal.

When mortgaged chattels are removed from the county in which the mortgage is recorded, the mortgagee having lost by his laches the right to insist on a forfeiture for such removal, the lien of the mortgage still subsisting, the mortgagor, as a condition of enjoining enforcement, may be required to execute a new mortgage precisely like the old, to be recorded in the county to which the property is removed, but may recover costs against the mortgagee.²

§ 890. **New York.**—Any mortgagor of personal property who shall hereafter, with intent to defraud a mortgagee or

¹ Rev. Stat. §§ 36-43.

² Grinlee v. Rockhill, 13 Atl. Rep. 609.

purchaser of such property, sell, assign, exchange, secrete, or otherwise dispose of any personal property upon which he shall have given or executed a mortgage, or any other instrument intended to operate as a mortgage, which, at the time, is a lien thereon, shall be deemed guilty of a misdemeanor, and upon conviction thereon shall be punished by a fine not exceeding three times the value of such property so sold, assigned, exchanged, secreted, or otherwise disposed of, or by imprisonment in the county jail of the county in which such offense is committed not exceeding one year, or by both such fine and imprisonment.¹

§ 891. **Instances.**—An action may be maintained against an auctioneer who sells mortgaged chattels, whereby they are scattered and lost to the mortgagee. It need not be shown as a prerequisite to the action that the mortgagor is irresponsible.²

A party executed a mortgage upon a team of horses, three acres of wheat, four acres of potatoes, twenty acres of oats. At the time of giving the mortgage the potatoes were not in existence. Afterwards two and one-half acres of potatoes were planted by the mortgagor, who died soon after. Afterwards the plaintiff, his widow and executrix, with knowledge of the mortgage, sold the potatoes to the defendant. It was held that the mortgagee acquired no title to the potatoes, and that the fact that he claimed them from the defendant, and forbid him to pay plaintiff, the administratrix, was no defense to the action by the vendee.³

When the answer in an action for conversion sets up that the title of the plaintiff in the property is that of the mortgagee only, and that defendant is entitled, upon making payment to the mortgagee, to a proportionate part of the hypothecated property, and that he has made such a payment, for which, in making demand of the goods, the plaintiffs have made no allowance, this is an admission of a valid

¹ 3 Rev. Stat. p. 978, § 73; Laws of 1871, ch. 77.

² *Malenghney v. Hegeman*, 9 Abb. N. Cas. 403.

³ *Cressey v. Sabre*, 17 Hun (N. Y.) 120.

transfer of an interest in the goods to plaintiffs, and of their right to recover for a proportionate part, as well as of a demand for the goods.¹

§ 892. **North Carolina.**—If any person who has executed a chattel mortgage or deed in trust, or given a lien, shall, after the execution of the same and while it is in force, make any disposition of any personal property embraced in said chattel mortgage, deed in trust, or lien, with intent to hinder, delay or defeat the rights of the person or persons to whom the said chattel mortgage, deed in trust, or lien was made, such person or persons so offending, and each and every person with a knowledge of the existence of the lien, buying the property embraced in said mortgage, deed in trust or lien, and every person assisting, aiding or abetting the mortgagor in disposing of such property with like intent to hinder, delay or defeat the rights of the person or persons to whom the said mortgage, deed in trust or lien was made, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding fifty dollars, or imprisonment not exceeding one month, but the fact of the registration of such mortgage, deed in trust, or lien shall not be evidence against the defendant upon any trial of the knowledge of said defendant of the existence of the same. Growing crops shall be considered personal property within the meaning of this act.²

§ 893. **Instances.**—The indictment under this section must set forth the manner in which the property was disposed of, and the name of the person who received it, or it will be fatally defective. The transaction must be particularly identified.³ It must also set forth that the lien was in force at the time of the sale.⁴

Where one who had mortgaged a matured crop, and was indicted under the statute for wrongfully selling, &c., a part

¹ *Gomez v. Kamping*, 4 Daly 77.

² Code, § 1089.

³ *State v. Pickens*, 79 N. Car. 652.

⁴ *State v. Burns*, 80 N. Car. 376.

of the mortgaged property with intent to hinder the mortgagee, evidence that it took all the crop raised to discharge his landlord's prior lien for rent and advances, is competent as tending to disprove criminal intent.¹

Where the mortgagor is authorized and directed by the mortgagee to prepare and house for market the mortgaged crop, and in pursuance of such directions, and in order to obtain money for such purpose, sells cotton included in the mortgage to a person who ships it to defendants, the mortgagee having received the benefits of the acts of the mortgagor, his agent in selling the cotton cannot maintain an action for conversion of such cotton.²

An indictment charged that the mortgagor of a certain mare executed the mortgage to secure a specified debt to the mortgagee; that after the execution of that mortgage, and while the same was in force, the mortgagor "unlawfully and willfully, and with intent to hinder, delay and defeat the rights of said T., sold and disposed of said mare, which was embraced in said mortgage; he, the said W. [defendant], then and there having knowledge of said lien on said mare," &c. It was held that the indictment failed to charge a criminal offense.³

§ 893a. **North Dakota.**—Every mortgagor of personal property, or his legal representative, who, while his mortgage remains in force and unsatisfied, willfully destroys, removes, conceals, sells, or in any manner disposes of or materially injures the property, or any part thereof, covered by such mortgage, without the written consent of the holder of such mortgage, shall be deemed guilty of felony, and shall, upon conviction, be punished by imprisonment in the penitentiary for a period not exceeding three years, or in the county jail not exceeding one year, and be fined not exceeding five hundred dollars.⁴

If the mortgagor voluntarily removes or permits the re-

¹ State v. Ellington, 98 N. Car. 749.

² Etheridge v. Hillard, 100 N. Car. 250.

³ State v. Woods, 104 N. Car. 898.

⁴ Penal Code, § 579.

removal of the mortgaged property from the county in which it was situated at the time of the execution of the mortgage, the mortgagee may take possession and dispose of the property as a pledge for the payment, though the debt is not due.¹

§ 894. **Ohio.**—A mortgagor of personal property, in possession of the same, who, without the consent of the owner of the claim secured by the mortgage, removes any of the property mortgaged out of the county where it was situated at the time it was mortgaged, or secretes or sells the same, or converts the same to his own use, with intent to defraud, shall be fined not more than five hundred dollars or be imprisoned not more than three months, or both.²

§ 894a. **Oklahoma Territory.**—If the mortgagor shall sell the mortgaged property while the lien is in force, without the consent of the mortgagee, upon conviction he shall be punishable by imprisonment in the penitentiary; or if he shall fraudulently conceal or remove the mortgaged property from the county, it shall be deemed a felony and punishable by imprisonment in the penitentiary.³

§ 894b. **Oregon.**—If any person shall give a chattel mortgage on personal property and shall then remove the same or sell it, or any part thereof, or otherwise dispose of it, with intent to defraud the mortgagee, or if he shall execute a mortgage upon chattels not owned by him, he shall be guilty of a penal offense.⁴

§ 895. **Pennsylvania—Instance.**—If personal property embraced in a mortgage of a leasehold, under the act of 1855, is removed by the lessee and mortgagor, it may be followed by the mortgagee and recovered by action of trover, and this although the mortgage is not due.⁵

§ 896. **Rhode Island—Instance.**—A mortgagor of personal property left in possession thereof, who again mortgages the

¹ Civil Code, § 1752.

² Rev. Stat. § 6849.

³ Gen. Laws, tit. "Mortgages."

⁴ Rev. Code, §§ 1771-1777.

⁵ Gill v. Weston, 110 Pa. St. 312.

entire property without giving notice of the existing mortgage, and afterwards gives the second mortgagee possession, or permits him to take possession thereof, is guilty of tortious conversion and is liable to the first mortgagee in an action of trover.¹

§ 897. **South Carolina—Instance.**—A chattel mortgage in this State is a transfer of title, and a stipulation permitting the mortgagor to retain possession until condition broken is personal to him and cannot be assigned; hence, the mortgagee, before condition broken, may maintain action for recovery against the purchaser at sheriff's sale of the mortgaged chattels.²

The mortgagor obtained the verbal permission of the mortgagee to exchange the mortgaged property for a mule, providing that a lien should be given on the property taken in exchange.

The exchange was made after the condition of the mortgage was broken. The mortgagor never gave to the mortgagee the lien promised on the mule, which died. Under these circumstances the mortgagee could not recover the property which his mortgage covered at first.³

§ 897a. **South Dakota.**—Every mortgagor of personalty who, while the lien remains in force and unsatisfied, willfully destroys, removes, conceals, sells or in any way disposes of, or materially injures the property or any part thereof covered by such mortgage, without the written consent of the holder of such mortgage, shall be deemed guilty of felony, and shall, upon conviction, be imprisoned in the penitentiary for a period not exceeding three years, or in the county jail not exceeding one year, and be fined not exceeding five hundred dollars.⁴

If the mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which

¹ *Millar v. Allen*, 10 R. I. 49.

² *Levi v. Legg*, 23 S. Car. 282; *Spriggs v. Camp*, 2 Spears 181.

³ *Bellune v. Wallace*, 2 Rich. 80.

⁴ Penal Code, § 579.

it was situated at the time of the execution of the mortgage, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.¹

§ 897*b*. **Tennessee.**—If the mortgagor of personal property, the mortgage having been registered according to law, shall remove, sell or conceal the property covered by the mortgage, with the intent and purpose to deprive the beneficiary of the same, he shall be punished by imprisonment.²

§ 898. **Texas.**—If any person has given or shall hereafter give any deed, or other lien in writing, upon any personal or movable property, and shall remove the same or any part thereof out of the State, or shall sell or otherwise dispose of the same, with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.³

§ 899. **Instances.**—If the property sold or otherwise disposed of while subject to an existing written lien be personal, though not movable property, the sale and disposition of it bring the offense within the meaning of the Code. But to be sufficient to charge the offense, the indictment must allege that the property was personal property. An ungathered crop still appendant to the ground can, under no circumstances, be held movable property, and cannot partake of the character of personal property until ready for harvest.

An indictment charging in substance that having executed a valid mortgage lien in writing upon eighteen acres of cotton then and there being movable property, the defendant subsequently selling the same with intent to defraud the mortgagee, is insufficient to charge any offense against the laws of this State.⁴

The Code providing that if a mortgagor of a growing crop

¹ Civil Code, § 1752.

² Code, § 2809 *et seq.*

³ Penal Code, art. 797. This article also includes growing crops.

⁴ *Hardeman v. State*, 16 Tex. App. 1.

of farm produce shall sell or otherwise dispose of the same with intent to defraud the mortgagee, shall be punished, &c., the requisite allegations in an indictment where the mortgage was executed on a crop not yet planted are, that the accused executed such a mortgage; that such crop was afterwards planted by him, and that when the same was growing or grown the said mortgage became a lien upon the same, and the accused fraudulently disposed of the same.¹

An indictment which charges the defendant with selling property conditionally mortgaged with intent to defraud, which fails to charge that the mortgage had become absolute by the happening of the condition before the selling, is bad.²

An indictment alleging that the mortgagor of certain horses did "run" the mortgaged property out of the State, instead of using the statutory word "removed," is sufficient. Wilson, J., says: "This is a conviction under Article 797 of the Penal Code. Instead of alleging, in the language of the statute, that defendant did 'remove' the property out of the State, the indictment alleges that he did 'run' it out of the State. The word 'run,' in the connection in which it is used in the indictment, is, we think, equivalent to the statutory word 'removed,' and we therefore hold that the use of 'run' instead of 'remove' does not render the indictment bad."³

But an indictment for fraudulently disposing of mortgaged property must allege the name of the person to whom it was disposed of, or that the name is unknown to the grand jury.

White, P. J., says: "Appellant in each of the above cases has been convicted of fraudulent disposition of mortgaged property. An indictment, to be sufficient to charge an offense of selling or disposing of mortgaged property with intent to defraud, must allege the name of the person to whom the mortgaged property was disposed of or sold, or

¹ Mooney v. State, 25 Tex. App. 31.

² State v. Devereux, 41 Tex. 383.

³ Williams v. State, 27 Tex. App. 258.

that the name of such person was unknown to the grand jury."¹

§ 900. **Validity of Bail-Bond.**—A bail-bond which recites that the principal is charged with unlawfully selling mortgaged property, does not state any offense known to the laws of Texas.²

§ 901. **Utah Territory.**—Any mortgagor who, pending the existence of the mortgage, shall destroy, conceal, sell, or otherwise dispose of all or any part of the mortgaged property, or who shall remove the same, or any part thereof, from the Territory, without the written consent of the mortgagee, shall be deemed guilty of obtaining money under false pretences and be punished by fine not exceeding three times the value of the property, or imprisonment for six months, or by both.³

§ 902. **Vermont.**—No mortgagor of personal property shall sell or pledge any such property by him mortgaged, without the consent of the mortgagee, in writing, upon the back of the mortgage, and on the margin of the record thereof in the office where such mortgage is recorded. No mortgagor shall execute any second or subsequent mortgage of personal property while the same is subject to a previously-existing mortgage or mortgages given by such mortgagor, unless the fact of the existence of such previous mortgage or mortgages is set forth in the subsequent mortgage. If any mortgagor shall be guilty of any offense against either of the two sections preceding, he shall be punished by fine equal to double the value of the property so wrongfully sold, pledged or mortgaged, one-half to the use of the party injured, and the other half to the use of the town where the mortgage is recorded.⁴

§ 903. **Washington.**—Any person having mortgaged per-

¹ *Armstrong v. State*, 27 Tex. App. 462; *Presley v. State*, 24 Tex. App. 494; *Alexander v. State*, 27 Tex. App. 94; *Smith v. State*, 26 Tex. App. 577.

² *Cravey v. State*, 26 Tex. App. 84.

³ Laws of 1884, pp. 28-32.

⁴ Laws of 1878, pp. 58, 59, §§ 8, 9, 10; Rev. Stat. §§ 1965-1979.

sonal property, who shall remove the same from the county where it was situated at the date of the mortgage before it is duly released, or without the consent in writing of the mortgagee, or who shall sell or dispose of the same, or any interest therein, where he parts with the possession thereof, or who shall secrete the same, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by imprisonment in the county jail for a term not exceeding three years.¹

§ 904. **Wisconsin.**—Any person having conveyed any personal property mortgaged, who shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, remove or carry, or drive away said property, or any part thereof, or cause the same to be done without the consent of the mortgagee or his assigns, and with the intent to defraud, shall be punished by imprisonment in the county jail not more than six months, or by fine not exceeding one hundred dollars.²

§ 905. **Wyoming.**—Any person who, after having conveyed any goods, chattels or personalty to another by mortgage, or conveyance intended to operate as a mortgage, shall, during the existence of the lien or title created by such mortgage or conveyance, sell the said property or any part thereof so mortgaged to any person or persons, or body corporate, without first procuring the consent of the mortgagee of the property to such sale, or shall remove said mortgaged property or any part thereof out of the jurisdiction of the District Court of the county within which such property was at the time such mortgage was given on it, with intent to deprive the mortgagee of his security, without first obtaining the consent of the mortgagee of such property to such removal, shall be deemed guilty of a felony; and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years, and be fined in a sum not exceeding five hundred dollars.³

¹ Code, § 1999.

² Rev. Stat. ch. 182, § 4467.

³ Rev. Stat. § 91.

CHAPTER XVIII.

SATISFACTION OF DEBT.

ARTICLE I.—PAYMENT OF DEBT.

- 906. Effect of Payment.
- 907. Extinguishment and Subsequent Assignment of Mortgage.
- 908. Payment as to Sureties.
- 909. Substituting New Note.
- 910. Revesting of Title.
- 911. Effect of Taking Second Mortgage on Same Property.
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- 925. Agreement to Release.
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- 927. Action for Refusal to Discharge.
- 928. Satisfaction—Contradicting Record.
- 929. Effect of Recital of Payment in a Deed of Trust or Other Instrument.

§ 906. **Effect of Payment.**—When the debt is wholly paid, the right of the mortgagee to take possession is discharged and the mortgage lien divested.¹ So, where personal property was mortgaged to enforce delivery of articles on a given day, and the articles were not delivered at the stipulated time, but were afterwards delivered and accepted, the lien created by the mortgage was thereby discharged.²

And, in general, the payment of the debt secured by a mortgage of personal property operates as a satisfaction of

¹ *Bradley v. Doud*, 11 Iowa 285.

² *Butler v. Tufts*, 13 Me. 302.

the mortgage and extinguishes the title conveyed by the mortgage.¹

So, when a mortgagee appoints the mortgagor as his agent to sell the mortgaged property, a sale by the mortgagor or agent of the mortgagee of property sufficient to discharge the debt, is, in fact, a discharge. And if the mortgagor, as agent, uses the money with the consent of the mortgagee, it constitutes a new debt, and is not embraced in the mortgage, and cannot be collectible under it. Neither can this new debt be a renewal of the mortgage, for it has already been discharged, and the money received by the mortgagor as agent is, in legal effect, received by the principal, the mortgagee.²

Such an agreement made the mortgagor agent of the mortgagee. His possession and sale were, in effect, those of the mortgagee. It was as if the latter had taken possession and placed a third party in charge to sell and account to the mortgagee, and he cannot escape from crediting on his indebtedness the proceeds of the sales made by such an agent, because he might fraudulently or dishonestly misapply or employ the money. "It is not a question between the mortgagees and mortgagors, who, of course, could not take advantage of their own wrong, and who remain liable to the plaintiffs for the money received and misapplied by them. But the question here is between mortgagees and the creditors, who have obtained a lien or an interest in the mortgaged property after the satisfaction of the mortgage. The mortgagees have made the mortgagors their agents, and their dealings with the property under the agreement constituting them such must be considered as the acts of agents and not of mortgagors, and will affect their principals accordingly. The moneys received by them from sales were, in legal effect, received by the mortgagees."³

¹ *Shiver v. Johnston*, 62 Ala. 37; *Harrison v. Hicks*, 1 Port. (Ala.) 423; *Deshazo v. Lewis*, 5 St. & Port. (Ala.) 91.

² *Weill v. Bank*, 106 N. Car. 1.

³ *Conkling v. Shelley*, 28 N. Y. 360; *Hunt v. Nevers*, 15 Pick. (Mass.) 500.

§ 907. **Extinguishment and Subsequent Assignment of Mortgage.**—Where the condition of the mortgage is that the mortgagor shall save harmless the mortgagee against liability, as his surety on a note due to a third party, the condition is performed when the mortgagor procures the cancellation of the note and the substitution of a new note in its stead, with a different surety. The mortgage being thereby extinguished, it cannot be assigned as security on a new note for the surety's indemnification, even though the assignment be made with the assent of the mortgagor for valuable consideration, and contemporaneously with the cancellation and substitution of the notes.¹

§ 908. **Payment as to Sureties.**—A mortgage of personal property given to sureties to protect them against their suretyship is not in force after the mortgagor has paid the debt. Thus, where a debtor gave his note and mortgage to his sureties, to secure them against their suretyship upon a note, and they assign the mortgage to the creditor for his security, taking from him a discharge, under seal, of their liability on the note, the mortgage is no longer in force, because the design of such a mortgage being merely to protect the security against the note, and this protection having been given by the creditor's discharge, the condition of the mortgage has been fulfilled.²

Where the surety has indorsed a note of the mortgagor, the mortgage lien is discharged on payment of the note by the principal.³

§ 909. **Substituting New Notes.**—When the indemnitors have not been saved harmless for their indorsements, the mortgage is not discharged. The substitution of new notes will not pay the original debt.⁴ Neither the taking of a new

¹ *Brooks v. Ruff*, 37 Ala. 371. See, also, *Bonham v. Galloway*, 13 Ill. 68; *Abbott v. Upton*, 19 Pick. (Mass.) 434; *Mead v. York*, 2 Seld. (N. Y.) 451.

² *Sumner v. Bachelder*, 30 Me. 35.

³ *Franklin Bank v. Pratt*, 31 Me. 501. See, also, *Packard v. Kingman*, 11 Iowa 219; *Hill v. Beebe*, 13 N. Y. 556.

⁴ *Olcott v. Rathbone*, 5 Wend. (N. Y.) 490. See, also, *Higgins v. Packard*, 2 Hall (N. Y.) 547; *Raymond v. Merchant*, 3 Cow. (N. Y.) 147; *Cromwell v. Lovett*, 1 Hall (N. Y.) 56; *Smith v. Prince*, 14 Conn. 472.

note and mortgage on personal property to secure an indebtedness, already evidenced by a note and secured by a mortgage on the same property, even where the first note and mortgage are canceled, will operate to discharge the lien of such first mortgage.¹

Taking a second mortgage on the same property is no waiver of the first one made for the same debt. Neither is the taking of personal security for the debt a waiver of the mortgage.² So, where a mortgage was given to secure a note, and the assignee of the mortgagee took a new note from the mortgagor in exchange for the old, it not being intended as payment, it was held that the mortgage debt was not thereby paid, but that the mortgage remained good to satisfy his security for the amount due on the new note.³

In general, a second mortgage for the same debt, on the same property, does not extinguish the first, and to render the second security a bar to the first, there must be a release, express or, at least, implied from a covenant not to sue.⁴

Where the first mortgage was to secure a debt evidenced by a note of the mortgagor, and after default the note was surrendered and a new note given for this amount and some additional indebtedness, and a second mortgage on the same property executed to secure the amount, it was held the first mortgage was not extinguished. Wright, J., says: "Surrendering the old note and taking a new one could not be a satisfaction or payment of the debt, and the mortgage being a security for the latter, would not be extinguished short of such payment. The debt was not merged in the first note, so that, by operation of law, the note being surrendered and a new one substituted, the debt was satisfied. The transaction was but taking another security of equal degree with the former one for the debt, which had not the legal effect of

¹ Packard v. Kingman, 11 Iowa 219.

² Burdett v. Clay, 8 B. Mon. (Ky.) 287.

³ Watkins v. Hill, 8 Pick. (Mass.) 522.

⁴ Gregory v. Thomas, 20 Wend. (N. Y.) 17.

extinguishing the first. Nor would an express parol agreement at the time of giving and receiving the second mortgage that the first should be deemed satisfied, have the operation to extinguish the first mortgage.”¹

§ 910. **Revesting of Title.**—Where the mortgagee or his assignee afterwards accepts payment of the debt or discharges the liability secured by the mortgage, the title reverts in the mortgagor without a redelivery or resale, and without a cancellation of the mortgage.² After condition broken, if a mortgagee of personal property receives the whole money from the mortgagor, that is a waiver of the forfeiture, and re-invests the title in the mortgagor, without any formal delivery. And if the mortgagee afterwards retains the property without sufficient reason, he will be liable in trover.³ But a tender and acceptance of part of the debt does not extinguish it.⁴

§ 911. **Effect of Taking Second Mortgage on Same Property.**—A chattel mortgage is not extinguished by a second mortgage on the same property to secure the debt mentioned in the first. The two mortgages are but collateral security for the debt. The debt was not paid, and, until that is done, all collateral securities should stand.⁵

This is on the principle that a subsequent security for a debt of equal degree with the former, for the same debt, will not by operation of law extinguish it.⁶

Neither is a mortgage of personal property, made to secure an indorser of a note, discharged by the indorser lending to the mortgagor money, which is applied to the

¹ *Hill v. Beebe*, 13 N. Y. 556.

² *Butler v. Tufts*, 13 Me. 302; *Flanders v. Barstow*, 18 Me. 357; *Paul v. Hayford*, 22 Me. 234; *Greene v. Dingley*, 24 Me. 131; *Parks v. Hall*, 2 Pick. (Mass.) 206; *Barry v. Bennett*, 7 Met. (Mass.) 354.

³ *Leighton v. Shapley*, 8 N. H. 359.

⁴ *Patchin v. Pierce*, 12 Wend. (N. Y.) 61.

⁵ *Butler v. Miller*, 1 Comst. (N. Y.) 500; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17.

⁶ *Manhood v. Crick*, Cro. Eliz. 716; *Higgins' Case*, 6 Rep. 45; *Phelps v. Johnson*, 8 Johns. (N. Y.) 54; *Preston v. Perton*, Cro. Eliz. 817; *Cornell v. Lamb*, 20 Johns. (N. Y.) 407.

payment of the note, unless the parties intend that the mortgage should be thereby discharged.¹ But where a mortgagor sells the mortgaged property, the lien will be discharged, if he executes afterwards a mortgage on other property, which is accepted by the mortgagee as a substitute for the security of the property sold.²

§ 912. **Mortgage Remains Security for New Note.**—Unless there is a showing to the contrary, a mortgage made to secure a note will remain security for any new note in payment of the former one.³ Thus, where a mortgage is given to secure payment of a note, and the assignee of the mortgage takes a new note from the mortgagor in exchange for the old one, it not being intended as payment, the mortgage debt is not thereby paid, but the mortgage remains good as security for the amount due on the new note, as against the mortgagor himself.⁴

§ 913. **Subsequent Mortgagee—Purchase of the Equity of Redemption.**—If a subsequent mortgagee purchases the equity of redemption at an execution sale, and pays off the prior mortgage, he thereby extinguishes his own mortgage, for he cannot subject the property in his own hands to its payment. He cannot foreclose against himself or sell the property to pay himself. He is paid by the operation of law.⁵

§ 914. **Subsequent Purchaser—Payment of Mortgage Lien.**—Where one buys property at a sheriff's sale on execution embraced in a chattel mortgage previously executed by the judgment debtor, the sale being subject to the mortgage, and subsequently purchases and takes an assignment of the mortgage, this will not operate as a payment or satisfaction of the mortgage. And if the mortgage has not been paid

¹ *Bryant v. Pollard*, 10 Allen (Mass.) 81. See, also, *Draper v. Saxton*, 118 Mass. 427.

² *Cobb v. Malone*, 87 Ala. 514.

³ *Hadlock v. Bulfinch*, 31 Me. 246. See, also, *Morse v. Clayton*, 13 Sm. & M. (Miss.) 373; *Bank v. Finch*, 3 Barb. Ch. (N. Y.) 293; *McCormick v. Digby*, 8 Blackf. (Ind.) 99; *Teed v. Carruthers*, 2 Y. & C. 31; *Huginin v. Starkweather*, 5 Gilm. (Ill.) 422.

⁴ *Watkins v. Hill*, 8 Pick. (Mass.) 522.

⁵ *Merritt v. Niles*, 25 Ill. 282.

or foreclosed, nor any power contained in it exercised, at the time of the transfer, it will be a valid, subsisting, unsatisfied mortgage.

The purchaser can either pay off the chattel mortgage, and thus protect his purchase under the execution, or purchase it and take an assignment, and protect himself in that manner. But if he pays off the mortgage it will be extinguished, and cannot be enforced against any other property contained in it. If he does not pay it, but takes it by purchase and assignment, it is an operative and valid instrument in his hands.¹

But had the sale under which the purchase was made, been under the mortgage instead of an execution, and the property had been bid off at a sum equal to the amount due thereon, that would have satisfied the mortgage and extinguished it.²

§ 915. **Purchasing with Mortgagor's Money.**—If the assignee of a mortgage invests in it purchase-money furnished to him by the mortgagor, the mortgage is *pro tanto* discharged. When the assignee seeks to foreclose, the mortgagor is entitled to a credit for the money thus advanced by him.³

A chattel mortgage is extinguished by payment made with the mortgagor's money by one who purchases the property at sheriff's sale, to aid the debtor in defrauding his creditors. There can be no subrogation of the purchaser of the equity of redemption to the mortgaged security through such a payment. Neither is there any merger of the mortgage in the equity of redemption upon an assignment of it to such purchaser, for there is no union in him of the property in the chattel and the charge upon it, because the charge was extinguished by payment before it was in form assigned to the purchaser.⁴

¹ *Brown v. Rich*, 40 Barb. (N. Y.) 28.

² *Charter v. Stevens*, 3 Denio (N. Y.) 33.

³ *McLemore v. Pinkston*, 31 Ala. 266.

⁴ *Thompson v. Van Vechten*, 27 N. Y. 568.

§ 916. **Extinguishment—Buying the Title of Both Parties.**—Where chattels are mortgaged by the owner, a purchaser who takes a bill of sale from both mortgagor and mortgagee acquires the title discharged of the mortgage.¹

§ 917. **Successive Mortgages—Paying Off Prior Mortgage.**—In equity, if there be successive mortgages upon property, real or personal, and the debtor or any person standing in his place, with notice of the second incumbrance, pays off the earlier one, it is extinguished as against the second incumbrance, and as against any person subsequently deriving title after the owner of the equity of redemption.²

§ 918. **Conversion by Mortgagee.**—Where one holding property in a mortgage converts it to his own use, the mortgage debt is thereby satisfied to the extent only of the value of the property.³ Or, if the mortgagee appropriates sufficient of the mortgaged property before the mortgage becomes due to satisfy the debt, the debt is extinguished, and the mortgagee's title to the surplus is discharged.⁴

§ 919. **Accepting the Property in Full Payment.**—If the payment of a note be secured by a mortgage of personal property, a demand of payment of the amount due on the note, after it becomes payable, is a waiver of forfeiture of the mortgaged property. The mortgagee may, however, in such case take the property into his possession as his own, unless he has relinquished the power so to do, and hold it subject to redemption. If the mortgagee takes the mortgaged property into his possession after the money has become payable, with the full understanding of the parties that the same shall be taken in full discharge of the note secured by the mortgage, his title becomes perfect.⁵

In Georgia the absolute title, after default, vests in the

¹ *Bangs v. Friezen*, 36 Minn. 423.

² *Otto v. Lord Vaux*, 39 Eng. Law & Eq. 611.

³ *Davis v. Rider*, 5 Mich. 423.

⁴ *Place v. Grant*, 9 Mich. 42; *Charter v. Stevens*, 3 Denio (N. Y.) 33; *Fuller v. Parrish*, 3 Mich. 211; *Thurber v. Jewett*, 3 Mich. 295; *Clark v. Griffith*, 2 Bosw. (N. Y.) 558.

⁵ *Greene v. Dingley*, 24 Me. 131.

mortgagee only for specific purposes, and it does not, therefore, operate as a payment of the debt; if the property is lost before such application it must fall upon the mortgagor. Fleming, J., says:

“The legal title is vested in the mortgagee for the purpose of enabling him to collect his debt. He is bound to account to the mortgagor for such amount as he may realize from the property. I care not whether this accountability is at law or in equity; it is enough for my argument that he is accountable. If the property more than pays his debt, he is liable for the excess. If it falls short of paying his debt, the mortgagor is still liable for the deficiency. This must be law, for it is justice.

“I grant that if loss occurs by reason of the neglect or fault of the mortgagee, he is responsible. But nothing of the kind has been shown in this case. Neither party is at fault. True, the mortgagee did not assert his legal right immediately on condition broken; but it is also true that the mortgagor earnestly appealed to him for indulgence. The negroes were allowed to remain with the mortgagor at his own request, and were in his possession when emancipation came. The result, to my mind, is very clear; the mortgagee has lost his security, the mortgagor his means of payment, so far as that security or those means depended on the negroes mentioned in the mortgage.”¹

§ 920. **Presumption of Payment.**—Possession by the mortgagor, after the maturity of the mortgage of the property pledged, is not presumptive evidence of the satisfaction of the mortgage debt, without proof that the property had once been delivered to the mortgagee; *aliter*, where the property had been in the mortgagee's possession and redelivered by him to the mortgagor.²

§ 921. **Effect of Mortgagor's Discharge in Bankruptcy.**—A discharge in bankruptcy does not discharge the mortgage

¹Tucker v. Toomer, 36 Ga. 138.

²Carpenter v. Bridges, 32 Miss. 265.

debt, so far as it is necessary to uphold the mortgage, although it relieves the debtor from personal liability.¹

§ 922. **Debt Barred by Statute of Limitations.**—If a note secured by a mortgage of personal property becomes barred by the statute of limitations, the mortgagee's title to the property is not thereby defeated. The security is not impaired for the reason that the statute of limitations, in case of contracts, affects the remedy only, without discharging the debt. It does not make the slightest difference that the note is barred by the statute of limitations, so far as the security is concerned.²

In general, if a note secured by a mortgage of personal property becomes barred by the statute of limitations, the mortgagee's title to the property is not thereby defeated.³

§ 923. **Mortgagor as Executor of Mortgagee's Estate.**—The mortgagee, by making his debtor an executor of his estate, does not thereby extinguish the mortgage.

The court, per Avery, J., says: "This is not a payment in fact of the debt. The administrator cannot sue himself, yet the debt is justly due from him to the estate. He is bound to collect, or endeavor to collect, all debts; and as he cannot bring a suit for this, he is treated as having the money already in his hands. In this respect, a fiction is employed to accomplish a useful result under that decision of the court. But a fiction will never be allowed to work injustice when it may be avoided. Nor does it follow, because an action at law will not lie for the debt, that proceedings in chancery cannot be maintained to subject the land according to the terms of the mortgage. A remedy upon the mortgage exists independently of the right to sue at law."⁴

¹ Chamberlain v. Meeder, 16 N. H. 381; Hamilton v. Bredeman, 12 Rich. (S. Car.) 464; Roden v. Jaco, 17 Ala. 344; Stewart v. Anderson, 10 Ala. 504.

² Cullum v. Bank, 23 Ala. 797; Duval v. McLoskey, 1 Ala. 710; Jones v. Jones, 18 Ala. 248.

³ Crain v. Paine, 4 Cush. (Mass.) 483; Thayer v. Mann, 19 Pick. (Mass.) 535.

⁴ Miller v. Donaldson, 17 Ohio 264; Winship v. Bass, 12 Mass. 199.

Proof of a debt against the estate of a deceased mortgagor, and receipt of a dividend from the assets of the same, do not extinguish the mortgage given to secure a part of such debt.¹

§ 924. **Mortgagor as Legatee of Mortgagee.**—A bequest of money by mortgagee to mortgagor does not extinguish the mortgage *pro tanto*, unless there is something in the terms of the bequest to show such intention in the testator.²

§ 925. **Agreement to Release.**—When a mortgagee has agreed to release one of several chattel mortgages on payment of a specific portion of the debt, an agreement made by him on payment of a lesser portion of the debt, to release one of the mortgaged chattels, is without consideration and void.³

§ 926. **Release by Receiver.**—A receiver appointed under a chattel mortgage contracted with the mortgagor that certain property covered by the mortgage should be the mortgagor's, in payment for services rendered; this contract was binding on the mortgagor.⁴

§ 927. **Action for Refusal to Discharge—Usury.**—Evidence of usury in a mortgage note is admissible on the question whether the amount legally due had been paid before the mortgagor was called on to discharge the mortgage, and that such evidence becoming immaterial in the course of the trial does not render its admission error.⁵ And when a mortgagee takes a renewal mortgage, in Minnesota, and notes which are usurious, he cannot recover the property under such junior mortgage, nor can he resort to the senior mortgage in the same action to recover the property.⁶

§ 928. **Satisfaction—Contradiction of Record—Buying Mortgage.**—An imperfect entry of satisfaction of a mortgage may

¹ Schuelenburg v. Martin, 1 McCrary C. C. 348, opinion by McCrary, J.

² Harrington v. Brittan, 23 Wis. 541.

³ Clark v. Griffith, 2 Bosw. (N. Y.) 558.

⁴ Ayers v. Hawk (N. J.), 11 At. Rep. 744.

⁵ Giffen v. Barr, 60 Vt. 599.

⁶ Barrows v. Thomas, 43 Minn. 270.

be shown by parol evidence to have been made by mistake, there being no pretense that the adverse parties have been misled by the mistake.¹

When one who has contracted to purchase property and pay off a mortgage on it as part consideration for the sale, rescinds the contract for a good cause, his subsequent purchase of the mortgage does not extinguish it.²

§ 929. **Effects of Recital of Payment in a Deed of Trust or Other Instrument.**—A recital of the payment of purchase-money in a deed, or of a receipt of a mortgage debt, in a release, is not always conclusive upon the parties.³ To constitute an estoppel *in pais* there must be actions or admissions intended and designed to influence the conduct of another; the actions or admissions must come to the knowledge of the party, and his conduct must be influenced by them, and a denial of them must operate to the injury of the party whose conduct is influenced by them.⁴

ARTICLE II.—APPLICATION OF PAYMENTS.

930. When Made by the Law.

931. Different Rule.

932. In the Discretion of the Court.

933. The Right to Appropriate the Payments.

934. Proceeds of Sale—Right of Mortgagee and Payee.

935. Proceeds Derived from Mortgaged Personalty.

§ 930. **When Made by the Law.**—When the law makes the application of payment it will make it in the manner most equitable; and in doing so the law will generally apply the payment to the eldest debt, or to the earliest item of the same debt, or to the debt that is due, in preference to the one that is not due. Generally, where one debt is secured and

¹ Boykin v. Rosenfield, 69 Tex. 115.

² Kuhlman v. Wood (Iowa), 46 N. W. Rep. 738.

³ Homer v. Grosholz, 38 Md. 520; Wolfe v. Hauver, 1 Gill (Md.) 84; Daingerfield v. May, 31 Md. 340.

⁴ Welland v. Hathaway, 8 Wend. (N. Y.) 483; Alexander v. Walter, 8 Gill (Md.) 249.

the other is not, the law will apply the payment to the debt which is not secured.¹

And thus, when neither party avails himself of his power, in consequence of which it devolves upon the court to apply the payments, it would seem reasonable that an equitable application should be made. It being equitable that the older debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious.²

§ 931. **Different Rule.**—A different rule prevails in some courts, and where the debtor has given no direction, and the creditor has made no particular application, the court should presume in favor of the debtor, that he intended to extinguish that debt which would bear most heavily upon him; as, for example, a mortgage or judgment.³

§ 932. **In the Discretion of the Court.**—Where money has been received in part payment of a running account, and no specific application has been made of the same, the Chancellor can, in his discretion, apply such money to that portion of the account which remains unsecured, without regard to the order of time in which the indebtedness for the several items of account was incurred.⁴

§ 933. **The Right to appropriate the Payments.**—Where different debts are due from the same party, the rule is well settled that he who makes the payment must declare on what account he pays it; if the payment is general, the right of appropriation is in the creditor.⁵

If the debtor does not apply the payments, the creditor may do so. If neither debtor nor creditor has made application of the payments, the court of equity will apply it to

¹ Shallabarger v. Binns, 18 Kans. 345.

² Field v. Holland, 6 Cranch (U. S.) 8. See, also, Mayor v. Patten, 4 Cranch (U. S.) 317; United States v. January, 7 Cranch (U. S.) 572.

³ Pattison v. Hull, 9 Cow. (N. Y.) 747; The Antarctic, 1 Sprague C. C. 206.

⁴ Schuelenburg v. Martin, 1 McCrary C. C. 348, opinion by McCrary, J.

⁵ Bell v. Radcliff, 32 Ark. 645; Wickerson v. Sterne, 9 Mod. 427; Manning v. Wortram, 2 Mod. 606.

the note to which there is no security in preference to applying it to a note secured.¹

§ 934. **Proceeds of Sale—Right of Mortgagee and Payee.**—Where, by the consent of the parties, mortgaged chattels are sold and the money paid to the mortgagee, he has the absolute right to apply it to the payment of the mortgage debt, and the mortgagor cannot direct its application to the payment of another debt due the mortgagee.²

The payee of a promissory note payable in installments has the right to apply the proceeds of personal property held by him under a mortgage as collateral security, and sold under a power of sale contained in the mortgage, towards the payment of any installment which may be due, at his option, if there is no agreement or direction to the contrary.³

§ 935. **Proceeds Derived from Mortgaged Personalty.**—The proceeds derived from the sale of the mortgaged property must be applied to the extinguishment of the mortgage debt, and not otherwise, if no agreement controls the appropriation. Whatever money may be realized from the sales of the property covered by the mortgage, the mortgagee is bound, in the absence of agreement to the contrary with the mortgagor, to apply it to the payment of the mortgage debt. While the general rule is that a creditor has the right to apply a general payment, unless the debtor when making it specifically directed its appropriation, the rule is that the payment derived from the security for a particular debt must be applied to its satisfaction.⁴

¹ *Burks v. Albert*, 4 J. J. Marsh. (Ky.) 98; *Heyward v. Lemax*, 1 Vern. 24; *Bacon v. Brown*, 1 Bibb (Ky.) 334; *Bird v. Davis*, 14 N. J. Eq. 467.

² *Masten v. Cummings*, 24 Wis. 623.

³ *Saunders v. McCarthy*, 8 Allen (Mass.) 42; *Allen v. Kimball*, 23 Pick. (Mass.) 473.

⁴ *Sanders v. Knox*, 57 Ala. 80.

ARTICLE III.—CHANGE IN THE FORM OF THE DEBT.

- 936. Reducing to Judgment.
- 937. Identification of Debt.
- 938. Effect of Taking Higher Security.
- 939. Substituting Securities of Equal Degree.
- 940. Waiver of Security.
- 941. Taking Second Security of Equal Degree.
- 942. An Agreement will Control.

§ 936. **Reducing to Judgment.**—The commencement of a suit upon a promissory note does not extinguish the lien of the chattel mortgage held as collateral security to the note. But the commencement of such suit is a waiver of the forfeiture of the condition of the mortgage.¹

The mortgage is wholly distinct from and collateral to the note, and a creditor has a distinct remedy on each security. Thus, after judgment on a note in a suit, the note undoubtedly merges in the judgment, and no further proceedings can be had directly upon the note, but it does not destroy the debt, and therefore does not defeat or release the mortgage, for the condition of the mortgage is, that the mortgagor shall pay the debt; and until the debt is actually satisfied, the mortgage remains in full force. As well might it be said that a renewal of a note secured by mortgage would have the effect to discharge the mortgage, but this is not its effect.²

A chattel mortgage was given to secure a number of notes. Subsequently, and after condition was broken, the mortgagor gave a bond and warrant of attorney for the same amount, and judgment was rendered on the bond. Another judgment had been recovered in favor of a third party and levied on the mortgaged property; the judgment was rendered in favor of the mortgagee on his bond and warrant the same day he received it, and he placed his exe-

¹ *Thurber v. Jewett*, 3 Mich. 295.

² *Pomroy v. Rice*, 16 Pick. (Mass.) 22; *Watkins v. Hill*, 8 Pick. (Mass.) 522; *Dunham v. Dey*, 15 Johns. (N. Y.) 554.

cution in the hands of the same officer who had previously levied in behalf of the third party. The goods were sold on the first execution and did not satisfy it. The mortgagee then undertook to resort to his mortgage for the payment of his debt. Jewett, J., gave the opinion of the court, and said: "In general, the acceptance of a higher security than the mortgagee had, is an extinguishment of the debt. Does not the law presume this judgment was taken as a satisfaction of the original debt? I am of the opinion that it was; the mortgagee took a new security for the old one, and the assent of the defendant to the judgment forces me to believe the parties did intend a satisfaction."¹ On appeal, Johnson, J., said: "It will scarcely be contended that, in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished the mortgage, and yet a mortgage on real estate is a mere security and incumbrance on land, and gives the mortgagee no title therein whatever, whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the performance of the condition. And if it be conceded that a judgment upon the original indebtedness would not extinguish a collateral security for its payment, upon real estate, I do not see how it could divest a title to personal property acquired by purchase. A vested legal title, whether in real or personal property, is the highest of all securities. Certainly higher than the mere lien of a judgment upon land, or the right of a plaintiff to personal property acquired by levy under execution. It is clear that the notes were merged in the judgment by operation of law, but it does not certainly follow that all the collateral securities would be extinguished. The debt is not yet satisfied, and until that is done, all mere collateral security, whether upon real or personal property, should be allowed to stand. Especially titles to property

¹ *Butler v. Miller*, 1 Denio (N. Y.) 407. See *Cleverly v. Brackett*, 8 Mass. 150.

acquired under instruments where the parties stand in the relation of vendor and purchaser without fraud," thus holding differently from the lower court and reversing its judgment.¹

But it is obviously true that if the mortgagee recovers judgment on a note secured by mortgage, and takes the mortgaged property in execution, he waives his mortgage and the lien thereby created.²

In the case of a pledge as well as a mortgage, the creditor may, at common law, proceed against the debtor in the same manner as if there was no pledge or mortgage, and is not bound to restore the pledge until the debt is paid.³

Judge Story says:⁴ "Upon principle, there would seem to be no reason to restrain the mortgagee from every remedy *in rem* and *in personam* until he has obtained full satisfaction of his debt. The debt ought to retain its original validity, it being independent of the mortgage or pledge, and if equity should interfere to enlarge the time of redemption or to prevent a double satisfaction, it is the utmost exercise of its authority which justice and conscience would seem to require. To deprive a creditor of a single satisfaction of his debt in favor of a negligent or fraudulent debtor would not comport with the maxims which usually govern courts."

The recovery of a judgment without satisfaction thereof upon a simple contract debt, will not discharge a pledge given as collateral security for the debt.⁵

§ 937. **Identification of Debt.**—If, after judgment has been given on the note, the mortgagor brings suit to redeem, he

¹ *Butler v. Miller*, 1 Comst. (N. Y.) 496.

² *Buck v. Ingersoll*, 11 Met. (Mass.) 226.

³ *Ratcliff v. Davis*, Yelv. 178, note; *Thurber v. Jewett*, 3 Mich. 295.

⁴ *Hatch v. White*, 2 Gall. C. C. 152.

⁵ *Fisher v. Fisher*, 98 Mass. 303; *Butler v. Miller*, 1 N. Y. 496; *Burton v. Tannehill*, 6 Blackf. (Ind.) 470; *Holmes v. Hinkle*, 63 Ind. 518.

The rendition of judgment on a note is no bar to an action of foreclosure. *O'Leary v. Snediker*, 16 Ind. 404; *Jenkinson v. Ewing*, 17 Ind. 505; *Duck v. Wilson*, 19 Ind. 190.

must identify the debt upon which the judgment was obtained as the mortgage debt.¹ A mortgagee, when he brings a suit to foreclose, after having obtained judgment on the note, must identify the two as the same debt.² But if the judgment is not collateral to the note and mortgage, and the original debt was merged or extinguished by the judgment, such will be held to be the effect of the judgment.³

§ 938. **Effect of Taking Higher Security.**—There can be no doubt that, as a general rule, where the creditor accepts from the debtor a higher security than he before had, it is an extinguishment of the first, and the law *prima facie* presumes it intended as an extinguishment.⁴

The general principle of law governing in cases of this kind, and which applies to all securities, is that a security of a higher nature extinguishes inferior securities, but not securities of equal degree.⁵

§ 939. **Substituting Security of Equal Degree.**—Where a mortgage is given to secure payment of a note, and the assignee of the mortgage takes a new note from the mortgagor in exchange for the old one, it not being intended as payment, the mortgage debt is not thereby paid, but the mortgage remains good as security for the amount due on the new note as against the mortgagor himself.⁶

A renewal of the note does not affect the security, although no expressed understanding is made in words to its continuance.⁷ A renewal of a note or a bill of exchange, secured by a mortgage is neither a payment nor a discharge of the

¹ Hall v. Forqueran, 2 Litt. (Ky.) 329.

² Holmes v. Hinkle, 63 Ind. 518.

³ Butler v. Miller, 1 Denio (N. Y.) 407. This case holds that whether a subsequent security of a higher nature is intended as collateral to a prior debt, or as a satisfaction and extinguishment of it, depends upon the intention of the parties; but in the absence of any evidence of intention, the law regards the higher security as the extinguishment of the prior one.

⁴ United States v. Lyman, 1 Mason C. C. 482.

⁵ Andrews v. Smith, 9 Wend. (N. Y.) 53; Higgins' Case, 6 Co. 44b.

⁶ Watkins v. Hill, 8 Pick. (Mass.) 522; Pomroy v. Rice, 16 Pick. (Mass.) 22; Smith v. Prince, 14 Conn. 472; Packard v. Kingman, 11 Iowa 219.

⁷ Cullum v. Bank, 23 Ala. 797.

lien of the mortgage.¹ Nor is a chattel mortgage discharged by merely taking a new note.²

But where there is any doubt as to the intention of the parties, it is a question for the jury to solve and not for the court.³

§ 940. **Waiver of Security.**—Where a mortgagor, after the delivery of the mortgage, gives his promissory note for the debt, an acceptance of such note by the mortgagee is not a waiver of the mortgage security. A creditor has a right to take as many securities as his debtor is willing to give.⁴

When the holder of one of several notes secured by mortgage delivered up the note to the mortgagor and maker, and took a new note for a different amount, payable at another date, and without any agreement that it should be secured by the mortgage, it was held that the holder lost his right to the security as against the holder of the other notes secured by the mortgage.⁵

§ 941. **Taking Second Security of Equal Degree.**—The taking of a new note and mortgage on personal property to secure an indebtedness already evidenced by a note, and secured by a mortgage on the same property, does not, even when the first note and mortgage are canceled, operate to discharge the lien of such first mortgage.⁶ Nothing but payment in fact of the debt, or the release of the mortgage, will discharge a mortgage.⁷

“But it is said that the defendant’s second mortgage extinguished the first; and consequently, being put to stand exclusively on the last, which was in 1835, the plaintiff’s mortgage of the previous September is let in. The argu-

¹ *Boyd v. Beck*, 29 Ala. 703.

² *Hill v. Beebe*, 13 N. Y. 556; *Flower v. Elwood*, 66 Ill. 438; *Choteau v. Thompson*, 3 Ohio St. 424; *Boswell v. Goodwin*, 31 Conn. 74; *Darst v. Bates*, 51 Ill. 439.

³ *Cadwell v. Pray*, 41 Mich. 307.

⁴ *Wescott v. Gunn*, 4 Duer (N. Y.) 107.

⁵ *Wilhelmi v. Leonard*, 13 Iowa 330.

⁶ *Packard v. Kingman*, 11 Iowa 219.

⁷ *Crosby v. Chase*, 17 Me. 369; *Hadlock v. Bulfinch*, 31 Me. 246.

ment is against all the books, ancient and modern. Adjudications of several centuries upon such cases, of every variety of form, in England, in this State and in neighboring States, settle the proposition that a subsequent security for a debt of equal degree with a former, for the same debt, will not, by operation of law, extinguish it."¹ There is no limit to the lifetime of a chattel mortgage, except such as is put upon it by the statute; otherwise it will remain until the debt is paid or barred.²

Taking a second chattel mortgage upon the same property covered by the first, to secure the same debt, is not of itself a cancellation of such first mortgage;³ when a debt is secured by two mortgages it should also have the benefit of the lien of the first mortgage.⁴

§ 942. **An Agreement Will Control.**—If a mortgagee in a chattel mortgage, after default in payment by the mortgagor, but before the mortgagee has taken the property, but no other proceedings under the mortgage, takes a new note payable at a later day than the first, and a new mortgage upon the same property, with the understanding and agreement between himself and the mortgagor that the new note and mortgage shall be a payment and satisfaction of the first note and mortgage, they are thereby extinguished.⁵

A mortgagee taking a new mortgage on the same and other property for the same debt, extending the time of payment, impliedly covenants that the first is thereby discharged and extinguished.⁶

When the agreement is that the new security shall take the place of the old, this is an extinguishment of the old. But otherwise, where the new security is only an additional

¹Gregory v. Thomas, 20 Wend. (N. Y.) 19.

²Morse v. Clayton, 13 S. & M. (Miss.) 381.

³Shuler v. Boutwell, 18 Hun (N. Y.) 171; Hill v. Beebe, 13 N. Y. 556.

⁴Drury v. Briscoe, 42 Md. 154.

⁵Daly v. Proetz, 20 Minn. 411. See, also, Paul v. Hayford, 22 Me. 234; Butler v. Miller, 1 Denio (N. Y.) 407; Chapman v. Jenkins, 31 Barb. (N. Y.) 164.

⁶Billingsley v. Harrell, 11 Ala. 775.

mortgage on the same property; it is then a cumulative security in connection with the prior mortgage, on the same property, to the same person, both to continue in force.¹

ARTICLE IV.—DISCHARGE BY AGREEMENT.

943. Withdrawal of Mortgage from the Files.

944. Release by Parol.

945. Waiving of Mortgage Security.

946. Sale—Mortgagor as Agent.

947. Valid Discharge by Written Instrument.

§ 943. **Withdrawal of Mortgage from the Files.**—Where a mortgagee gives authority to the mortgagor, in writing, to withdraw the mortgage from the files, and he does it, the mortgage is thereby extinguished. The lien of the mortgage was lost when the mortgage was taken from the files and destroyed by the authority of the mortgagee.²

But if an agent exceeds his authority in taking the mortgage from the files, the lien is not thereby lost. Thus, where the mortgagee of a chattel mortgage sent a party to the clerk's office to see whether the mortgage had been properly filed, and the agent misunderstood the order of the mortgagee, and took it and carried it to his principal, who thereupon used due diligence to cause it to be refiled, the lien thereof remains as against one who, with knowledge of the facts, attached the property while the mortgage was absent from the files.³

The filing, in some States, takes the place of recording, and the instrument is no more to be removed from the clerk's office during the existence of the lien than the records of such office. Every person who has or may acquire an interest in the property has a right to have the instrument remain on file and open to inspection, and this applies with much greater force when the mortgage contains peculiar or unusual provisions.⁴

¹ *Paine v. Waite*, 11 Gray (Mass.) 190.

² *Gruner v. Star Print Co.*, 40 Wis. 523.

³ *Swift v. Hall*, 23 Wis. 532.

⁴ *Ward v. Watson*, 24 Nebr. 592.

§ 944. **Release by Parol.**—A mortgage of personal property, so far as it conveys the title to the property to the mortgagee, may be released or discharged by a subsequent verbal contract. Either an agreement by the mortgagor to do certain things, or the performance of those things by him, may be made the ground of settlement or discharge.¹

The right of a mortgagee to personal property may be agreed to be settled or discharged in one of two ways: Either an agreement to do certain things may itself be the ground of settlement or discharge, or a doing of these things may be the ground of settlement or discharge.²

§ 945. **Waiver of Mortgage Security.**—A waiver of the mortgage security is not necessarily or usually a waiver of the debt secured. If the mortgagee permits the property to be sold upon an inferior lien, he is not precluded from recovering upon the mortgage debt.³

He can absolve the mortgagor from personal obligation and have recourse to the security alone for payment.⁴

§ 946. **Sale—Mortgagor as Agent.**—It has been decided in New York that the mortgagee can make the mortgagor his agent to sell the goods mortgaged. The sales made and proceeds received by the mortgagor under such an arrangement must be applied in payment and satisfaction of the mortgage, whether the money is ever actually paid over to the mortgagee or not. The court holds that when the mortgagee agreed to this arrangement he made the mortgagor his agent, and if done in good faith it was a lawful transaction. But if the mortgagor had been allowed to remain in possession and sold the goods for his own benefit, it would have been unlawful. But this doctrine is not accepted by many

¹ *Acker v. Bender*, 33 Ala. 230; *Wallis v. Long*, 16 Ala. 738; *Deshazo v. Lewis*, 5 St. & Port. (Ala.) 91.

² *Flockton v. Hall*, 14 Ad. & E. (N. S.) 380; *Babcock v. Hawkins*, 23 Vt. 561; *Cartwright v. Cooke*, 3 Barn. & Ad. 701; *Bradley v. Gregory*, 2 Camp. 383; *Very v. Levy*, 13 How. 345.

³ *Jones v. Turck*, 33 Iowa 246.

⁴ *Ball v. Wyeth*, 99 Mass. 338.

courts, and the mortgagor cannot become the agent of the mortgagee in the sale of mortgaged goods.¹

§ 947. **Valid Discharge by Written Instrument.**—A mortgagee of personal property having made an agreement with the mortgagor for the benefit of a purchaser, subsequently signed and sent the mortgagor a written instrument agreeing to discharge the mortgage and to hold the purchaser harmless in relation to it. The mortgagor delivered the same to the purchaser, by whom it was carried to the office of the recorder, who thereupon made an entry, signed and attested by him, on the margin of the record of the mortgage as follows: "This mortgage having been duly canceled by the mortgagor, and an order for discharge given by the mortgagee, therefore this record is made." It was held that these facts were evidence from which the jury might find that there had been a *bona. fide* discharge of the mortgage.²

ARTICLE V.—CONSTRUCTIVE PAYMENT.

948. Tender.

949. At Law—After Forfeiture.

950. A Valid Tender.

951. In Equity and Under the Codes.

952. Trover by Mortgagor.

953. Destruction of Property After Proper Tender.

954. Re-investment of Title.

955. After Default the Tender Must be Kept Good.

956. Michigan Rule.

957. Oregon Rule.

958. Mortgagor's Right.

§ 948. **Tender.**—The general rule is, though many courts have modified it, that a tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted nor kept good, has the effect to release the property from the lien of the mortgage. But if the tender be made after default of payment at the stipulated time, it must be kept good or it will be entirely unavailing.

¹ Conkling v. Shelley, 28 N. Y. 360. See, also, Whitney v. Heywood, 6 Cush. (Mass.) 82.

² Stowell v. Goodale, 6 Cush. (Mass.) 452.

And to be available it must be without qualifications—that is, there must not be anything raising the implication that the debtor intends to cut off or bar a claim for any amount beyond the sum tendered.

Thus, when the mortgagor, at the stipulated time, showed the mortgagee \$500, and told him he could have it for his claim, it was a conditional offer, and therefore unavailing as a tender.

Judge Lake says: “The act of tender here referred to took place long after the maturity of the note which the mortgage was given to secure, and the question is, whether the last proposition of this instruction states the law correctly.” This proposition reads: “And in order to discharge the lien of the mortgage, such tender, if refused, need not be kept good or the money brought into court.”

The judge continues: “From the cases cited it is certain that there is much conflict in the more recent decisions as to the effect of a tender upon a security, if made after what is termed the ‘law day’ has passed, while probably there is none as to the fact that, if made on that day, it will release the property from the lien. At the common law, to have this effect, the tender must be made on the day the debt falls due, but need not be kept good.”¹

The most wholesome rule is, that a tender of the amount due after the time agreed upon, unless kept good, will not operate to release the lien of a mortgage given to secure it.²

The rule that a tender after default, if not kept good, will release the lien, is more applicable to mortgages which are regarded as a mere security for a debt, and the mortgagor is regarded as the owner of the property until his right of redemption is foreclosed.

But in those States where a mortgage is a conditional sale, with a defeasance, and the legal title passes to the mortgagee, subject to the mortgagor’s right to perform the condition, and after default the legal title becomes absolute in the

¹ *Tompkins v. Batie*, 11 Nebr. 147.

² *Crain v. McGoon*, 86 Ill. 431.

mortgagee, the rule of the common law applies. According to this rule, a mortgagor who failed to perform the conditions in the mortgage would forfeit his right to the land or to redeem it by subsequently tendering the amount due upon the mortgage.¹ In case of such a forfeiture the mortgagor could obtain relief only in a court of equity, wherein the land mortgaged was treated as a mere pledge which the mortgagee held as security for the debt due him. Under this rule of the common law a tender after the law day must be kept good or it will be entirely unavailing as such.

§ 949. **At Law—After Forfeiture.**—As to chattel mortgages a tender by the mortgagor after forfeiture will not restore him to his former title, unless the mortgagee accepts the money. The tender of the amount due after the law day has passed, unaccepted, does not divest the mortgagee of his legal title to the property mortgaged; to get redress he must apply to a court of equity. Judge Royce says: "A tender of the amount due upon the mortgage after default in payment would not, at law, re-invest the mortgagor with his former title to the property. Nothing short of an acceptance of the sum tendered would, as between mortgagor and mortgagee, extinguish the legal title of the latter in the property mortgaged."²

In California a tender of the money due on a bond and mortgage, after the law day of the mortgage, and a refusal to accept it, do not discharge the lien of the mortgage. Judge Baldwin said: "The debtor is as much in default for not paying when the debt is due as the creditor is in default for not receiving the money afterwards when offered. It would be very harsh to hold that the debt is lost—the general effect of losing the security by a mere refusal, at a particular moment, to receive it—that refusal induced, too, as it might be, by a variety of circumstances morally excusing it, or, at

¹ Broom & Hadl. Com. (Am. ed.) 612, n. 288.

² Blodgett v. Blodgett, 48 Vt. 32; Smith v. Kelley, 27 Me. 237; Hill v. Payson, 3 Mass. 559; Parsons v. Welles, 17 Mass. 419; Jones v. Smith, 2 Ves. Jr. 378.

least, not grossly violative of any positive duty, and productive of little or no injury to any one.”¹

In New York it has always been held, in reference to real-estate mortgages, that a tender on the law day discharges the lien of the mortgage; and, although a clear departure from the old law, it is fully settled that a tender after the law day will have the same effect. And generally a tender of money due upon a real-estate mortgage, at any time before foreclosure, discharges the lien, though made after the law day and not kept good.² But as to chattel mortgages the rule is different, because of the difference in structure and effect between such a security and a mortgage upon real estate; the latter being a lien only, and conveying no title to the land, while the former transfers the title at once, subject to a defeasance by performance of the condition annexed, the payment of the debt.³ This rule of the New York courts is consonant with the weight of authority as to tender in payment of the debt secured by a chattel mortgage.

In Massachusetts the equitable rule is adopted as to tender, the court stating that the rule applies to mortgages of personal property as well as to mortgages of real estate. The mortgagor has a right to redeem by statute. “The mortgagor redeems when he pays or tenders the sum due, or performs or offers performance of the thing to be done. His right of property then becomes complete and absolute. By the terms of the statute a tender of the payment is equivalent to payment, and an offer of performance is as effectual as performance. He becomes entitled to have the property ‘forthwith restored,’ and upon a failure to restore he has a perfect legal remedy,” and the mortgagor need not make

¹ *Perre v. Castro*, 14 Cal. 519. See, also, *Himmelmann v. Fitzpatrick*, 50 Cal. 650.

² *Jackson v. Crafts*, 18 Johns. (N. Y.) 110; *Edwards v. Farmers*, 21 Wend. (N. Y.) 467; *Arnot v. Post*, 6 Hill (N. Y.) 65; *Kortright v. Cady*, 21 N. Y. 343. See, also, *Charter v. Stevens*, 3 Den. (N. Y.) 33; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Ackley v. Finch*, 7 Cow. (N. Y.) 290; *Rogers v. Travelers Ins. Co.*, 6 Paige (N. Y.) 583; *Merritt v. Lambert*, 7 Paige (N. Y.) 344.

³ *Noyes v. Wyckoff*, 30 Hun (N. Y.) 466; affirmed in 114 N. Y. 204, though on another point.

profert of the money, or renew the tender at the trial. Judge Knowlton says: "This statute gives the payment or tender of payment of the debt, and all proper charges at any time before foreclosure, the same effect upon the rights of the parties in the property which it would have had if made when the debt was due. In either case, if the mortgagee refuses the tender, he may afterwards sue for his debt, but loses his security."¹ In this case the citations of the New York cases are those pertaining to real-estate mortgages, and, as held by New York courts, do not apply to chattel mortgages.

So, in Minnesota, the tender of the amount due, even after maturity of the debt upon a chattel mortgage, extinguishes and discharges the lien of the mortgage, and it is not necessary to keep the tender good by bringing the money into court in case an action is thereafter brought by the mortgagee to obtain possession of the property. The court accepts the rule adopted in New York in reference to real-estate mortgages.

Collins, J., speaking for the court, says: "This doctrine in regard to real-property mortgages has been steadily adhered to in the State of New York, and with the common law correctly stated, as it has been, in respect to the sweeping effect of a tender made upon law day, it is difficult to see what distinction can now be suggested, when considering the force and effect of a tender made upon the law day and one made thereafter. We are positive none can be pointed out which possesses any real merit."²

§ 950. **A Valid Tender.**—A tender of money in payment of a debt must be, to be available, without qualifications—that is, there must not be anything raising the implication that the debtor intends to cut off or bar a claim for any amount beyond the sum tendered.³ Thus, although a party who tenders money has a right to exclude any presumption

¹ Weeks v. Baker (Mass.), 24 N. E. Rep. 905.

² Moore v. Norman, 43 Minn. 428.

³ Tompkins v. Batie, 11 Nebr. 147.

against himself, that the sum tendered is in part payment of the debt, yet, if he adds a condition that the party who receives it shall acknowledge that no money is due, this will invalidate the tender.¹ The tender must be without qualifications, so that there can be no implication that the debtor intended to bar a claim for any amount beyond the sum tendered. Thus, a tender of a sum in full discharge of all demands is not valid, because, if the tender of a sum as all that is due, that being disputed, and the creditor receives it, under the circumstances it might compromise his rights in seeking to recover more, whereas, if the same sum was tendered unconditionally, no such effect could follow.²

So, a tender is not valid if it be accompanied with a demand of a discharge of the party by whom or for whom the money is tendered.³

§ 951. **In Equity.**—Many courts, by provision of the statute, or by the principles of equity, hold that after condition broken, the mortgagor has an equity of redemption which may be asserted, if he brings his bill in a reasonable time, when the time is not specified by statute.⁴ And the general rule is, that when the mortgagor of chattels, which are to be taken under the mortgage after condition broken, tenders an amount of money sufficient to pay the debt, and which tender is kept good until trial, when it is paid into court, it divests the title of the mortgagee as effectually as would a payment of the debt; and the mortgagee, by taking and selling the mortgaged property, is guilty of conversion.⁵

¹ Chitty on Cont. 699, note.

² Wood v. Hitchcock, 20 Wend. (N. Y.) 47.

³ Richardson v. Boston Chem. Laboratory, 9 Met. (Mass.) 42. See, also, Thayer v. Brackett, 12 Mass. 450; Loring v. Cooke, 3 Pick. (Mass.) 48; Bank v. De Grauw, 23 Wend. (N. Y.) 342; Griffith v. Hodges, 1 Car. & P. 419; Peacock v. Dickerson, 2 Car. & P. 51, note; Strong v. Harvey, 3 Bing. 304; Ryder v. Townsend, 7 Dowl. & Ryl. 119; Glasscott v. Day, 5 Esp. 48.

⁴ Kemp v. Westbrook, 1 Ves. 278; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 100; Charter v. Stevens, 3 Den. (N. Y.) 33; Patchin v. Pierce, 12 Wend. (N. Y.) 61; Hinman v. Judson, 13 Barb. (N. Y.) 629; Blodgett v. Blodgett, 48 Vt. 32.

⁵ Rice v. Kahn, 70 Wis. 323.

The tender being made after the maturity of the debt, must be kept good in order to divest the lien.¹

§ 952. **Trover by Mortgagor.**—A tender must be made before condition broken, in order that the mortgagor may maintain trover against the mortgagee for the property.²

After condition broken and tender made, the mortgagor's remedy, in Missouri, is by suit in equity to redeem.³

§ 953. **Destruction of Property After Proper Tender.**—If a mortgagee of a mortgage, after proper tender of the amount of the debt, refuses the money, and then the property is lost or destroyed, he must lose it.⁴

§ 954. **Re-Investment of Title.**—If the mortgagee of personal property, after condition broken, receives the money from the debtor, that is a waiver of the forfeiture and re-invests the title in the mortgagor without any formal delivery.⁵ Whenever the mortgagee receives a satisfaction of the debt the mortgagor's title is re-invested in him.⁶

Where personal property was mortgaged to insure the delivery of chattels on a given day, and they were not delivered at the stipulated time, but they were afterwards

¹ *Knox v. Williams*, 24 Nebr. 630; *Crain v. McGoon*, 86 Ill. 431. See, also, *Cheminant v. Thornton*, 2 Carr. & P. 50; *Mitchell v. King*, 6 Carr. & P. 237; *Sutton v. Hawkins*, 8 Carr. & P. 259; *Strong v. Harvey*, 3 Bing. 304; *Glasscott v. Day*, 5 Esp. 48; *Richardson v. Boston Chem. Lab.*, 9 Met. (Mass.) 42; *Perre v. Castro*, 14 Cal. 519; *Maynard v. Hunt*, 5 Pick. (Mass.) 240.

When the debt is fully paid, no tender is necessary before beginning action. *Bank v. Marshall*, 11 Fed. Rep. 19; *Walker v. Staples*, 5 Allen (Mass.) 34; *Whitaker v. Sumner*, 20 Pick. (Mass.) 399; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Kimball v. Hildreth*, 8 Allen (Mass.) 167; *Bright v. Wagle*, 3 Dana (Ky.) 252; *Ely v. Hooper*, 1 Pennypacker (Pa.) 175; *Dewey v. Bowman*, 8 Cal. 145; *United States v. New Orleans*, 98 U. S. 381; *Matthews v. Sheehan*, 69 N. Y. 585; *Lary v. Nat. Trust Co.*, 4 Week. Dig. 56; *Briggs v. Bryan*, 8 Week. Dig. 259.

² *Heyland v. Badger*, 35 Cal. 404.

³ *Jackson v. Cunningham*, 28 Mo. App. 354.

⁴ *Goodman v. Pledger*, 14 Ala. 114.

⁵ *Leighton v. Shapley*, 8 N. H. 359.

⁶ *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Charter v. Stevens*, 3 Denio (N. Y.) 33; *Barry v. Bennett*, 7 Met. (Mass.) 354; *West v. Crary*, 47 N. Y. 423; *Harrison v. Hicks*, 1 Port. (Ala.) 423; *Parks v. Hall*, 2 Pick. (Mass.) 206; *Moak v. Bourne*, 13 Wis. 514; *Thompson v. Van Vechten*, 27 N. Y. 568; *Sumner v. Bachelder*, 30 Me. 35; *Porter v. Parmley*, 52 N. Y. 185; *Flanders v. Barstow*, 18 Me. 357; *Greene v. Dingley*, 24 Me. 131.

delivered and accepted by the mortgagee, this discharged the lien of the mortgage.¹

§ 955. **After Default the Tender Must be Kept Good to be Set Up as a Defense.**—The rule generally is, that a tender made after default in the terms of the mortgage must be kept good and paid into court in order to be a good defense in an action by the mortgagee for possession.²

§ 956. **Michigan Rule.**—In those States where a chattel mortgage is considered only a lien and not a sale, the tender need not be kept good and paid into court on trial in order to discharge the lien. Thus, in Michigan, after tender, the mortgagor can maintain replevin against the mortgagee for possession of the goods, whether the money is paid into court or not.³

The mortgagor is immediately entitled to the possession of the property after tender, and may bring trover for its value, when not returned, and the mortgagee cannot recoup for his debt.⁴

§ 957. **Oregon Rule.**—Formerly a chattel mortgage in Oregon was considered a security only for a debt and not a sale. Under that rule it was decided that a tender need not be kept good and paid into court at the trial. Even an offer, in writing, to pay, when not accepted, is a sufficient tender of money under the Code, and such tender will discharge the lien of the property covered by a chattel mortgage.⁵

§ 958. **Mortgagor's Right.**—If a mortgagee, availing himself of the stipulation in a chattel mortgage, takes possession of the property, or is about to do so, before the debt is due, he thereby confers on the mortgagor the right to pay the debt and keep his property. In such case, if the tender is kept good, it divests the title of the mortgagee, and if,

¹ *Butler v. Tufts*, 13 Me. 302.

² *Musgat v. Pumpelly*, 46 Wis. 660.

³ *Flanders v. Chamberlain*, 24 Mich. 305.

⁴ *Fuller v. Parrish*, 3 Mich. 211.

⁵ *Bartel v. Lope*, 6 Oreg. 321.

thereafter, he takes the property away and sells it, against the remonstrance of the owner, he is liable for conversion.¹

ARTICLE VI.—MERGER AND SUBROGATION.

959. Merger.

960. When the Mortgagee Buys the Equity of Redemption.

961. Subrogation.

962. Rights of Surety.

963. Execution Creditor.

964. Payment by Third Party.

§ 959. **Merger.**—A mortgagee who takes judgment for the amount of his debt does not merge the mortgage nor lose his right to subsequent foreclosure; but he may, on a subsequent day of the term, take a decree of foreclosure of the mortgage.²

§ 960. **When the Mortgagee Buys the Equity of Redemption.**—When the mortgagee purchases or takes a release of the equity of redemption the whole estate is then vested in him, and the mortgage and the mortgage debt are extinguished, unless it is expressly or impliedly apparent that the parties intended otherwise; or if the mortgagee takes a conveyance of part of the mortgaged property it operates to extinguish the mortgage debt *pro tanto*.³

§ 961. **Subrogation.**—A creditor is entitled to the benefits of a mortgage placed by his debtor in the hands of a security for indemnifying or securing against a debt, and may enforce it for his own benefit.⁴ But to give a creditor the right to be substituted to the place of a surety who holds a mortgage given to indemnify him against his liability to the creditor, the creditor's claim must be valid, binding and capable of being enforced immediately against him. If the relation of debtor and creditor has never existed between them, or having

¹ *Rice v. Kahn*, 70 Wis. 323.

² *Muncie Nat. Bank v. Brown*, 112 Ind. 474. See, also, *Teal v. Hinchman*, 69 Ind. 379; *Evansville, &c., v. State*, 73 Ind. 219; *Pence v. Armstrong*, 95 Ind. 191; *Curtis v. Gooding*, 99 Ind. 45.

³ *Wilhelmi v. Leonard*, 18 Iowa 330.

⁴ *Troy v. Smith*, 33 Ala. 469.

existed it has been terminated by release, or payment, or in any other mode, there can be no substitution.¹

Where a creditor of a mortgagor of chattels, who has levied on and sold the property, is compelled, by order of court in which he has filed a bill, to bring into court the amount secured by the mortgage, and the mortgagee, by leave of court, withdraws the same, then, even though such order was erroneously made, the creditor will have the right, in equity, to be subrogated to the rights of the mortgagee under the mortgage.²

§ 962. **Rights of Surety.**—When a surety is compelled to pay the debt of his principal he is entitled to be subrogated to the right of the creditor against the principal debtor. Thus, the surety being subrogated, upon receiving the assignment of the chattel mortgage, is entitled to enforce it for his reimbursement.³ And the surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security transferred to him, and to avail himself of those securities against the debtor.⁴ So, where the principal and surety each mortgages his own property as security for the debt of the principal, and the surety pays the debt, the principal's mortgage, given to secure such debt, passes to the surety by operation of law, and he is subrogated to all the rights of such creditor;⁵ and the surety is entitled to have the property of the principal sold first, and applied in satisfaction of the debt.⁶

If the surety pays the debt of the principal before maturity, he cannot maintain an action against him until the time for payment has expired; but if he is not repaid at that

¹ *Constant v. Matteson*, 22 Ill. 546.

² *Magill v. Dewitt Co. Sav. Bank*, 126 Ill. 244.

³ *Lewis v. Palmer*, 28 N. Y. 271. See, also, *Clason v. Morris*, 10 Johns. (N. Y.) 524; *Matthews v. Aiken*, 1 Comst. (N. Y.) 595; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Bowditch v. Green*, 3 Met. (Mass.) 360.

⁴ *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 180.

⁵ *Fields v. Sherrill*, 18 Kans. 365; *Low v. Smart*, 5 N. H. 353; *Muir v. Berkshire*, 52 Ind. 149.

⁶ *Neimcewicz v. Gahn*, 3 Paige (N. Y.) 614; *James v. Jacques*, 26 Tex. 320; *Keel v. Levy* (Oreg.), 24 Pac. Rep. 253.

time there is no reason why he may not sue to recover the amount which he paid in discharge of the debt.¹

§ 963. **Execution Creditor.**—When a chattel mortgage is considered as a mere security, an execution creditor, upon payment of the chattel mortgage, which is a prior incumbrance upon the chattels on which his execution has been levied, is entitled to be subrogated to the rights of the mortgagee, after he pays the debt to the latter; and to that end he has a right to demand an assignment of the mortgage.²

§ 964. **Payment by Third Party.**—A payment to a mortgagee by a third party, who is under no obligation by contract to pay the mortgage debt, will not operate as a satisfaction of it, unless it be manifestly so intended by the party making the payment. Though the sale made by the mortgagee is irregular, and not such as effectually to foreclose the mortgage, it will have the effect of transferring to the purchaser the mortgage claim.³

In order to subrogate such third party to the mortgagee's interest, he must have an interest which entitles him to redeem. If he has no such interest, although he may take possession of the property, upon paying the mortgage debt, the property is liable to attachment or execution in his hands, upon the suit of a creditor of the mortgagor.⁴

ARTICLE VII.—STATUTORY PROVISIONS.

965. Release.

§ 965. **Release.**—In most of the States it is provided by statute that the mortgage shall be released after satisfaction, by entry upon the record or margin of the recording-book. Penalties are imposed upon the mortgagee who neglects or refuses to make these entries, by the laws of the States.

¹ *Ross v. Menefee* (Ind.), 25 N. E. Rep. 545.

² *Lueking v. Wesson*, 25 Mich. 443.

³ *Walker v. Stone*, 20 Md. 195.

⁴ *Woods v. Gilson*, 17 Ill. 218.

In Alabama any mortgagee, transferee or assignee of such mortgage who has received satisfaction of the amount secured by such mortgage, must, at the written request of the mortgagor, enter satisfaction upon the margin of the record thereof, which operates as a release of such mortgage, and a bar to all actions thereon; and must, at the written request of a *bona fide* creditor of the mortgagor, enter the amount received by him thereon and date thereof. Failing for three months to make such entry, either in person or by attorney, after such payment and request, he forfeits to the party aggrieved \$200, unless, where demand is for entry of satisfaction, at the time of such request, or within said three months, there shall be a pending suit between said parties, involving the question whether such mortgagee, transferee or assignee has received satisfaction of such mortgage. The payment of the debt secured by mortgage has the effect to divest the title of the mortgagee or his assigns, and re-invest the same in the mortgagor or his assigns.¹

In Arkansas the mortgagee, after request, must release the mortgage within sixty days, or forfeit to the party aggrieved any sum not exceeding the amount of the mortgage debt, which may be recovered by civil action in any court of competent jurisdiction.

The mortgage may be released by entry of satisfaction on the margin of the record of the mortgage in the recorder's office, by the mortgagee.²

In California the mortgagee must, upon request, discharge the mortgage at once, either by a satisfaction-piece, duly proved or acknowledged and recorded, or by an entry of satisfaction on the margin of the record, signed by the mortgagee and witnessed by the recorder. If the mortgagee neglects or refuses to discharge the mortgage after satisfaction, he becomes liable for all damages to the mortgagor, and also forfeits to him \$100.³

¹ Code, § 1869.

² Digest of Stat. ch. 110, §§ 4745-4748.

³ Civil Code, §§ 2938-2941.

In Colorado entry of satisfaction or receipt on mortgage or record thereof operates as a release and reconveyance of title.¹

The law of Florida provides that the mortgage may be discharged by acknowledging satisfaction thereof before the clerk of the Circuit Court, when recorded, and proper entry upon the record, or by a satisfaction-piece, either indorsed upon the mortgage or separate therefrom, duly proved or acknowledged for record before some officer authorized by the laws of Florida to take acknowledgments of deeds.²

In Georgia it is customary to discharge recorded mortgages, when satisfied, by a written certificate entered upon the record by the clerk.³

The law of Illinois provides that the mortgagee must release the mortgage after satisfaction within one month, upon request of the mortgagor and tender of his reasonable charges. For refusal to release, he forfeits to the party aggrieved the sum of \$50, to be recovered in an action of debt before a justice of the peace. The release may be entered upon the margin of the record of such mortgage in the recorder's office. The mortgage can also be released by an instrument in writing executed by the mortgagee, acknowledged or proved in the same manner as deeds for the conveyance of land.⁴ Such entry of satisfaction re-invests the mortgagor with title without reconveyance.⁵

In Iowa, when the mortgage debt is paid, the clerk enters satisfaction in the margin of such mortgage record.⁶

So, in Kansas, a mortgage may be released on the margin of the record in presence of the register.⁷

In Kentucky the satisfaction of the debt may be entered

¹ Gen. Stat. § 160 *et seq.*

² Laws of 1874, p. 75; Dig. Laws, 1881, p. 769.

³ Acts of 1884-5, p. 129.

⁴ Rev. Stat. ch. 95, §§ 8-10.

⁵ *Cottingham v. Springer*, 88 Ill. 90.

⁶ Code, §§ 277-8.

⁷ Laws of 1889, ch. 173, § 3910.

on the margin of the record of the mortgage by the holder of such debt, attested by the clerk of the county.¹

The Maine statute provides that a mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee personally or by an attorney-at-law authorized in writing or by a deed of release.²

In Minnesota a chattel mortgage is satisfied by filing in the same office a written certificate to that effect.³

In Montana a chattel mortgage is discharged by acknowledgment of satisfaction signed by the mortgagee, his legal representatives or assigns, indorsed upon the mortgage or copy thereof, filed as aforesaid.⁴

In Mississippi the mortgagee must release the title within three months, after satisfaction of the mortgage debt, upon request, and tender made for his reasonable expenses. For neglecting such duty he forfeits to the aggrieved party any sum not exceeding the mortgage-money.⁵

The Missouri law provides that in case of failure to release the mortgage after satisfaction, within thirty days, upon request of the mortgagor, the mortgagee shall forfeit ten per cent. upon the amount of the mortgage and any other damages the party aggrieved may have sustained.⁶

In Nebraska, when a chattel mortgage is satisfied, it may be discharged by an entry by the mortgagee, his agent or assigns, on the margin of the index, which shall be attested by the clerk; or by the clerk on the presentation or receipt of an order in writing, signed by the mortgagee and attested by a justice of the peace or some officer with a seal. If the mortgagee, his assigns or representatives, shall neglect, for the space of ten days, after being requested, to discharge the

¹ Gen. Stat. ch. 24, § 10.

² Gen. Stat. ch. 90, §§ 27-29.

³ Gen. Stat. of 1878, ch. 39, § 13.

⁴ Laws of 1881, p. 3, § 11.

⁵ Code, §§ 1206, 1207.

⁶ Rev. Stat. §§ 3311, 3312.

same as aforesaid, he is liable in the sum of fifty dollars, in addition to actual damages.¹

The Nevada statute prescribes that any mortgage may be discharged or assigned by an entry on the margin of the record thereof, signed by the mortgagee, or his representative or assigns, acknowledging the satisfaction of or value received for the mortgage, and the debt secured thereby, in the presence of the recorder or his deputy, who shall subscribe the same as a witness, and such entry shall have the same effect as a deed of release or assignment duly acknowledged or recorded.²

In New Hampshire no stated form for discharge is established. Any memorandum upon the mortgage, signed by the mortgagee, stating the mortgage has been satisfied, will cancel the mortgage.³

In New Jersey cancellation of the mortgage will be made by the clerk of the county on application to him made by the mortgagor or the person redeeming, paying and discharging the mortgage, and producing to him the mortgage canceled; or a receipt thereon, signed by the mortgagee, his heirs, executors, administrators or assigns; or a certificate signed by him or them, and acknowledged or proved and certified in the same manner as is required for conveyances, specifying that the mortgage has been paid or otherwise satisfied and discharged.⁴

In New York a chattel mortgage may be discharged by presenting to the officer in whose office it is filed a certificate from the mortgagee, or the holder or owner of the mortgage, that such mortgage is paid or satisfied.⁵

In North Carolina the mortgage is released as follows:

The trustee or mortgagee or his legal representative, agent or attorney, may, in the presence of the register, acknowl-

¹ Laws of 1885, p. 260.

² Laws of 1885, §§ 2604-2607.

³ See Gen. Laws, p. 327.

⁴ Rev. Stat. p. 707; Supp. 1886, p. 134.

⁵ Laws of 1879, ch. 171; Laws, 1884, ch. 326.

edge the satisfaction, whereupon the register shall forthwith make upon the margin of the record of such mortgage, an entry of such acknowledgment or satisfaction, which shall be signed by the mortgagee or his agent, and witnessed by the register.¹

So, in North Dakota a mortgage may be released by the entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the register of deeds, or upon the record by a certificate duly executed, acknowledged or proved, and certified and recorded the same as the mortgage.²

The Ohio law prescribes that a satisfaction of a mortgage shall be made by entering satisfaction, or a receipt for the same, either on the mortgage or on the record of the mortgage. No acknowledgment, witness or seal is required to release. When the release is on the mortgage, then it should be entered by the recorder on the records.³

In Oregon a mortgage is discharged upon the record by an entry in the margin thereof, signed by the mortgagee or his agent, acknowledging the satisfaction of the mortgage.⁴

In Rhode Island mortgages are discharged by release on the face of the record, or upon the mortgage, by the mortgagee, or by a separate deed of release.⁵

In South Dakota a mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assigns, acknowledging the satisfaction of the mortgage, in the presence of the register of deeds, or upon the record, by a certificate duly executed, acknowledged, or proved and certified and recorded the same as the mortgage.⁶

In Texas mortgages are discharged by payment, no record

¹ Code, § 1271; Bat. Rev. ch. 35, § 29.

² Civil Code, § 1750.

³ Laws 1888, p. 284.

⁴ Code, § 3031.

⁵ Pub. Stat. ch. 176, §§ 6, 7.

⁶ Civil Code, § 1750.

of discharge being necessary except to show perfect title on record.¹

In Utah Territory a mortgage is discharged by entry on the margin of the record, or by a satisfaction-piece, executed, acknowledged, certified and recorded in the same manner as a deed.²

The Vermont statutes provide that mortgages may be discharged by entry on the margin of the record thereof, by entry on the mortgage deed, signed and sealed in the presence of one or more witnesses and recorded upon the margin of the record, or by recording a certificate of payment.³

In West Virginia, mortgages, deeds of trust, &c., are discharged by a short deed of release, acknowledged before an officer authorized to take acknowledgments of deeds, and admitted to record in the proper county.⁴

In Wisconsin, after payment of any chattel mortgage, the mortgagor demands of the mortgagee, his personal representative or assignee, a certificate of such payment, and within ten days after receiving such certificate, the mortgagor must file it in the office where the mortgage is filed, and remove the mortgage from the files.⁵

In Kansas, if the mortgagee fails to release the mortgage after satisfaction, he may be fined \$100, and if the property is sold subject to the mortgage, the purchaser, after satisfaction, is the proper party to bring suit to recover the penalty.⁶

¹ See Rev. Laws of 1879, ch. 127, § 5.

² Com. Laws, pp. 254-263.

³ Rev. Laws, §§ 1965-1979; Laws of 1886, No. 91; Rev. Laws, 1774-1885; Laws of 1888, Nos. 79, 82.

⁴ Code, ch. 76, §§ 1, 2.

⁵ Rev. Stat. § 2313 *et seq.*

⁶ *Coffman v. Hillard* (Kans.), 24 Pac. Rep. 1098.

PART VI.—RIGHTS OF PARTIES AFTER DEFAULT.

CHAPTER XIX.

FORECLOSURE AND SALE.

ARTICLE I.—NON-FORMAL FORECLOSURE.

- 966. Mortgagee's Title After Condition Broken.
- 967. Michigan Rule.
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- 970. Taking Possession Under Stipulation in the Mortgage.
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- 990. Wrongful Seizure.
- 991. As to Third Parties.
- 992. Pursuing the Wrong Remedy.
- 993. Wrongful Foreclosure.

§ 966. **Mortgagee's Title After Condition Broken.**—The legal title of the mortgaged property, with right of possession, is in the mortgagee, and this title becomes absolute after condition broken. The only right, then, that the mortgagor has is an equitable action to redeem.¹ And a

¹ *Brown v. Lipscomb*, 9 Port. (Ala.) 472; *Wright v. Ross*, 36 Cal. 414; *Larmon v. Carpenter*, 70 Ill. 549; *McConnell v. People*, 84 Ill. 588; *Blodgett v. Blodgett*, 48 Vt. 32; *Musgat v. Pumpelly*, 46 Wis. 669; *Byron v. May*,

mortgagee, when the legal interest has thus been transferred to him, stands, in a court of law, in the same situation as if he were an absolute purchaser.¹ It is not necessary to foreclose by judicial proceedings, but the mortgagee may proceed to sell the personal property upon due notice to the mortgagor.²

As a general proposition, however, a right of lien gives no right to sell the goods. But when goods are deposited by way of security to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade.³

So, if the mortgagor fails to pay or tender the debt when or before it becomes due, but allows the stipulated time to elapse, the mortgage title, defeasible before, becomes absolute at law, and the property vests in the mortgagee and may be levied on and sold for the mortgagee's debts.⁴

The mortgagee commits no violence of the rights of the mortgagor in taking possession of the mortgaged property upon default in the payment of the mortgage debt. The only right which a mortgagor can have after breach of con-

2 Pin. (Wis.) 448; *Smith v. Coolbaugh*, 21 Wis. 428; *Bates v. Wilbur*, 10 Wis. 415; *Smith v. Konst*, 50 Wis. 360; *Rice v. Kahn*, 70 Wis. 323; *Smith v. Phillips*, 47 Wis. 202; *Flanders v. Thomas*, 12 Wis. 410; *Hall v. Bellows*, 3 Stock. (N. J.) 334; *Fikes v. Manchester*, 43 Ill. 379; *Simmons v. Jenkins*, 76 Ill. 479; *Durfee v. Grinnell*, 69 Ill. 371; *Bean v. Barney*, 10 Iowa 498; *Brown v. Phillips*, 3 Bush (Ky.) 656; *Winchester v. Ball*, 54 Me. 558; *Flanders v. Barstow*, 18 Me. 357; *Landon v. Emmons*, 97 Mass. 37; *Wells v. Connable*, 138 Mass. 513; *Fletcher v. Neudeck*, 30 Minn. 125; *Mann v. Flower*, 25 Minn. 500; *Braley v. Byrnes*, 21 Minn. 482; *Volney Stamp v. Gilman*, 43 Miss. 456; *Thornhill v. Gilmer*, 4 Sm. & M. (Miss.) 153; *Robinson v. Campbell*, 8 Mo. 365; *Bowens v. Benson*, 57 Mo. 26; *Tompkins v. Batie*, 11 Nebr. 147; *Adams v. Nat. Bank*, 4 Nebr. 370; *Bryant v. Carson River Lum. Co.*, 3 Nev. 313; *Leach v. Kimball*, 34 N. H. 568; *Judson v. Easton*, 58 N. Y. 664; *Bragelman v. Daue*, 69 N. Y. 69; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Charter v. Stevens*, 3 Denio (N. Y.) 33; *Brown v. Bement*, 8 Johns. (N. Y.) 98; *Talman v. Smith*, 39 Barb. (N. Y.) 390; *Ackley v. Finch*, 7 Cow. (N. Y.) 290; *Fuller v. Acker*, 1 Hill (N. Y.) 473; *Hulsen v. Wolter*, 34 How. Pr. (N. Y.) 385; *Burdick v. McVanner*, 2 Denio (N. Y.) 170; *Williams v. Dobson*, 26 S. Car. 110; *Wolff v. Farrell*, 3 Brev. (S. Car.) 68; *Reese v. Lyon*, 20 S. Car. 17.

¹ *Mervine v. White*, 50 Ala. 388.

² *Tucker v. Wilson*, 1 P. Wms. 262; *Lockwood v. Ewer*, 7 Mod. R. 279.

³ *Pothonier v. Dawson*, Holt N. P. 385.

⁴ *Heyland v. Badger*, 35 Cal. 404. See Section 810.

dition is either to bring an action to redeem the mortgaged property, which must be commenced before the foreclosure of the mortgage by sale, or an action against the mortgagee to account for any surplus proceeds of the sale which might remain after satisfying the mortgage debt.

So, an action to redeem cannot be commenced after sale, as per the stipulations in the mortgage. Then, the only right of the mortgagor is to have the mortgagee account properly for the proceeds of the sale, and to such an action the mortgagee would certainly have a right to set up any claim, whether secured by the mortgage or not, which he may have against the mortgagor.¹

But this rule is different when the action is brought by the mortgagee to foreclose the mortgage, because the action being based upon the contract to pay the mortgage debt, the mortgagee is entitled to recover no more than the amount secured by the contract.²

A mortgagee of chattels may maintain an action at law for the conversion of the goods, although not in his actual possession. He has also a right to resort to a court of equity to obtain a foreclosure of the equity of redemption and a sale of the chattels, and also to protect the property from conversion or destruction until a sale is effected. The conduct and fairness of a sale of chattels by the mortgagee, and the rights acquired thereunder, are always open to investigation at the instance of the mortgagor.³

§ 967. **Michigan Rule.**—A chattel mortgage does not transfer the legal title until after foreclosure, or something equivalent thereto, which must usually be by a sale; and the proceeds of the sale by the mortgagee must be treated as means collaterally to apply on the security, and do not belong to the mortgagee beyond the extent of his lawful claim as a creditor.⁴ A chattel mortgage simply creates a lien upon

¹ *Reese v. Lyon*, 20 S. Car. 17.

² *Reese v. Lyon*, 20 S. Car. 17.

³ *Freeman v. Freeman*, 17 N. J. Eq. 44.

⁴ *Kohl v. Lynn*, 34 Mich. 360.

the property mortgaged. It does not, without foreclosure, convey any title.¹

§ 968. **Oregon Rule.**—It was at one time held in this State that a chattel mortgage simply created a lien upon the mortgaged property, and did not convey any title. Judge Burnett said :

“It is no doubt true that at common law a mortgage of chattels vested the title in the mortgagee, and after default by the mortgagor the title of the mortgagee was absolute; but under the statute he is not entitled to the possession of the chattels as a matter of right until condition broken; and it appears from the different sections of the statute in regard to chattel mortgages that they simply create a lien upon the property mortgaged in favor of the mortgagee, and do not vest any title without foreclosure.”²

The rule has been changed, and now a mortgagee has the right to begin action to gain possession of the mortgaged property after condition broken.³ The common-law definition has been adopted by the courts.⁴

§ 969. **Washington Rule.**—This State has also adopted the equitable rule, and the courts hold that a chattel mortgage is a mere security under which no title can pass except by foreclosure and sale.⁵

§ 970. **Taking Possession Under Stipulation in the Mortgage.**—A provision in a chattel mortgage authorizing the mortgagee to take possession, if at any time he deems himself insecure, is generally equivalent to giving him the right of possession whenever he chooses to demand it.⁶ But such stipulation will not justify the mortgagee in taking possession and selling the property after tender by the mortgagor of the

¹ *Lucking v. Wesson*, 25 Mich. 443; *Baxter v. Spencer*, 33 Mich. 325; *Cary v. Hewitt*, 26 Mich. 228.

² *Chapman v. State*, 5 Oreg. 432.

³ *Case v. Campbell*, 14 Oreg. 460.

⁴ *Hembree v. Blackburn*, 16 Oreg. 153.

⁵ *Byrd v. Forbes*, 3 Wash. St. 318.

⁶ *Gage v. Wayland*, 67 Wis. 566.

amount due and interest, and trover will lie for the conversion.¹

When the mortgagee takes possession of the mortgaged chattels he must fully comply with the statute before selling them, or he will be liable to the mortgagor for any damages he may sustain.² An assignee of the debt may advertise the property for sale and attach the mortgagee's name to the notice of sale, and such foreclosure will be valid. Thus, a chattel mortgage was given to the mortgagee, but was not formally transferred to his assignee, who held the debt which it was given to secure. The assignee foreclosed, affixing the name of the mortgagee to the notice of sale. This was held to be a valid foreclosure.³

§ 971. **With No Time of Payment in the Mortgage.**—A chattel mortgage given to secure an existing debt, that contains no time of payment, is due as soon as given to secure so much of the indebtedness as was due at the time of its execution, and the mortgagee may, even after a part of the debt has been paid, take possession and sell the property to pay the balance.⁴ Thus, a trust deed was made, but specified no time of payment; it was held that it was due as soon as given.⁵

And, in general, an instrument containing no express promise of interest, and specifying no time of payment, either at a future day or on demand, is due and payable as soon as given;⁶ and, in case of a mortgage, it is by implication an interest-bearing security from date.⁷

¹ *Harder v. Hosp*, 69 Wis. 288.

² *Stromberg v. Lindburg*, 25 Minn. 513; *Brink v. Freoff*, 40 Mich. 610; *Simpson v. Carleton*, 1 Allen (Mass.) 109; *Black v. Howell*, 56 Iowa 630; *Denny v. Faulkner*, 22 Kans. 89; *French v. Edwards*, 13 Wall. (U. S.) 506.

³ *Carpenter v. Bank* (Minn.), 47 N. W. Rep. 150.

⁴ *Bearss v. Preston*, 66 Mich. 11. See, also, *Dikeman v. Buckhafer*, 1 Abb. Pr. (N. S.) 32; *Farrell v. Bean*, 10 Md. 217; *Howland v. Willett*, 3 Sand. (N. Y.) 607.

⁵ *Eaton v. Truesdail*, 40 Mich. 1.

⁶ *Sheehy v. Manderville*, 7 Cranch (U. S.) 208.

⁷ *Purdy v. Phillips*, 11 N. Y. 406; *Gillett v. Balcom*, 6 Barb. (N. Y.) 370; *Reid v. Rensselaer Glass Factory*, 3 Cow. (N. Y.) 436; *Goodloe v. Clay*, 6 B. Mon. (Ky.) 236; *Farquhar v. Morris*, 7 Term R. 120.

§ 972. **Payable on Demand.**—A mortgage given to secure a note payable on demand is payable immediately.¹

A foreclosure suit is a sufficient demand, and so is a notice of intention to foreclose, legally given.²

§ 973. **No Time of Performance Specified.**—When a mortgage is given to secure the performance of some act or contract other than the payment of money, and no time of performance is specified, this omission does not avoid the contract, and the law will require the performance within a reasonable time.³

When a mortgage is given to secure a note described in the instrument, that note must be produced, and the mortgage is notice to no other claim than the one described in the instrument.⁴

§ 974. **Taking Possession Must be Peaceable.**—The mortgagee of personal property has no right to take it out of the mortgagor's possession by force or threats, or against his will, although the law day is passed, and the mortgage contains an express power authorizing the mortgagee to take possession on default being made in the payment of the secured debt.⁵ He has a right to take possession if he can do so without a breach of the peace.⁶

§ 975. **Extending the Time of Payment by Parol Agreement.**—Although the mortgage be under seal, the time of payment may be extended by parol as between the parties, and the condition saved until the expiration of the extended time,⁷ and the mortgagee will not be justified in seizing the property before the expiration of the extended time.⁸

¹Southwick v. Hapgood, 10 Cush. (Mass.) 119.

²Goodrich v. Willard, 2 Gray (Mass.) 203.

³Byram v. Gordon, 11 Mich. 531.

⁴Hinchman v. Town, 10 Mich. 508.

⁵Thornton v. Cochran, 51 Ala. 415.

⁶Thompson v. Thornton, 21 Ala. 808; Flanders v. Barstow, 18 Me. 357; Brackett v. Bullard, 12 Met. (Mass.) 308; Bell v. Pharr, 7 Ala. 807; Coty v. Barnes, 20 Vt. 78; Sheppards v. Turpin, 3 Gratt. (Va.) 373; McLure v. Hill, 36 Ark. 268.

⁷Flanders v. Barstow, 18 Me. 357.

⁸Baxter v. Spencer, 33 Mich. 325. Compare Bowens v. Benson, 57 Mo. 26.

§ 976. **A Valid Promise.**—A valid promise for an extension of time of the payment must be a promise founded upon a consideration, or such as the mortgagor might properly rely upon, and make the sale by the mortgagee within the time specified wrongful.¹

In case of a mortgage specifying no time of payment, parol evidence of an agreement that it should not be immediately payable, is not admissible.²

§ 977. **Default in Payment of an Installment.**—A mortgage given to secure notes becoming due at different times, the mortgagee, on default of payment of either of the notes when due, is entitled to the possession of the goods;³ and this may be had if the default is in making payment of the first installment.⁴

§ 978. **Proceeds May be Retained to Meet the Other Installments.**—Where there has been a sale of the mortgaged property for non-payment of first installment or of the interest due, the mortgagee has the right to retain the proceeds to meet the installments which have not matured.⁵ He has the option to take possession upon default in payment of the first installment, or to await the maturity of the entire debt. His authority to do so, by the terms of the mortgage, imposes on him no obligation to take possession.⁶

§ 979. **Michigan Rule.**—If the mortgagee seizes the property when only one installment is due and sells it to a third party for the satisfaction of the whole mortgage, the sale being illegal, the mortgagor is entitled to recover the value of the property sold, after the first installment has been paid, together with special damages, if any are shown, but with a

¹ *Williams v. Stern*, L. R., 5 Q. B. Div. 409.

² *Bates v. Ripp*, 1 Abb. App. Dec. (N. Y.) 78.

³ *Burton v. Tannehill*, 6 Blackf. (Ind.) 470.

⁴ *Murray v. Erskin*, 109 Mass. 597; *Bragelman v. Daue*, 69 N. Y. 69; *McConnell v. Scott*, 67 Ill. 274.

⁵ *Flanders v. Barstow*, 18 Me. 357.

⁶ *Chapin v. Whitsett*, 3 Colo. 315; *Barbour v. White*, 37 Ill. 164; *Cleaves v. Herbert*, 61 Ill. 126.

deduction of the amount then remaining unpaid on the mortgage.¹

This is upon the principle that where a party to or interest in a thing is partial, damages for its conversion by one holding the rest of the title or interest should, as respects the value of the thing, be partial also—that is, the mortgagee is entitled to deduct from the whole value of the property converted the amount of the notes unpaid secured by the mortgage.²

§ 980. **The Mortgagee's Remedy for Withholding the Property.**—After the forfeiture the mortgagee may maintain replevin or detinue for the mortgaged goods against one who tortiously withholds the property,³ or against a creditor of the mortgagor who has levied upon it.⁴

Under the Codes of some of the States the mortgagor can make equitable defenses in suits at law, and when the mortgage has not been foreclosed he can reduce the recovery against him to the actual amount due on the mortgage debt.⁵

§ 981. **Joint Mortgagors—Application of Proceeds.**—Where a mortgagee takes possession and sells for his own benefit, applying the proceeds, with the consent of only one of the joint mortgagors, to the payment of another debt, this satisfies

¹ *Brink v. Freoff*, 44 Mich. 69; 40 Mich. 610.

² *Brierly v. Kendall*, 17 Q. B. 937; *Johnson v. Stear*, 15 C. B. (N. S.) 330; *Brown v. Phillips*, 3 Bush (Ky.) 656; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300; *Ball v. Liney*, 48 N. Y. 6; *Fowler v. Gilman*, 13 Met. (Mass.) 267; *Chamberlain v. Shaw*, 18 Pick. (Mass.) 278.

³ *Hopkins v. Thompson*, 2 Port. (Ala.) 433; *Welch v. Sackett*, 12 Wis. 243; *Fuller v. Acker*, 1 Hill (N. Y.) 473.

⁴ *Nelson v. Wheelock*, 46 Ill. 25; *Macomber v. Saxton*, 28 Mich. 516; *Hendrickson v. Walker*, 32 Mich. 68; *Spriggs v. Camp*, 2 Spears (S. Car.) 181; *Mobley v. Letts*, 61 Ind. 11; *Stringer v. Davis*, 35 Cal. 25; *Frisbee v. Langworthy*, 11 Wis. 375; *Swift v. Hart*, 12 Barb. (N. Y.) 530; *Cary v. Hewitt*, 26 Mich. 228; *Mervine v. White*, 50 Ala. 388; *Brookover v. Esterly*, 12 Kans. 149; *Bates v. Wilbur*, 10 Wis. 415; *Brown v. Phillips*, 3 Bush (Ky.) 656; *Machette v. Wanless*, 1 Colo. 225; *Bellamy v. Doud*, 11 Iowa 285; *Fikes v. Manchester*, 43 Ill. 379; *Lacey v. Giboney*, 36 Mo. 320.

⁵ *Hinman v. Judson*, 13 Barb. (N. Y.) 629.

Property exempt from attachment may be recovered from the mortgagor's widow, by the mortgagee, though set off to her by the order of court. She could redeem by paying the debt. *Recker v. Kilgore*, 62 Ind. 10.

the mortgage as to the other mortgagors and the mortgage debt is extinguished.¹

§ 982. **Stipulation Under Insecurity Clause.**—If a chattel mortgage authorizes the mortgagee to take possession whenever he may deem himself in danger of loss, he may do so at any time when acting in good faith, on facts arising since the mortgagee deemed himself unsafe.²

The mortgage may stipulate for the possession of the mortgagor until default, and that the mortgagor shall not dispose of, nor remove, nor permit an attachment of the property, under penalty of its being taken possession of by the mortgagee. If the property is attached, the mortgagee may take possession.³ But if there be no breach of condition or agreement, the mortgagee cannot claim possession.⁴

§ 983. **Construction of Insecurity Clauses.**—A mortgagee who, by the terms of the mortgage, has authority to take possession on default, "as his own property, and without any process of law," has no right to take it otherwise than peaceably, either in person or by an officer.⁵

A mortgage of personal property containing a provision that the mortgagee might sell after condition broken or before that, if at any time he should deem himself unsafe, held that no notice was required.⁶

Under a chattel mortgage containing a clause, in Illinois, that if the mortgagee should feel himself unsafe or insecure he should have the right to take possession, it is not enough that he should feel himself unsafe, but he should also have probable cause therefor.⁷

This rule does not seem to be received in Kansas. If the mortgage in that State stipulates that the mortgagee may take possession before the debt matures if he deems himself

¹ *Askew v. Steiner*, 76 Ala. 218.

² *Barrett v. Hart*, 42 Ohio St. 41.

³ *Eddy v. Kenny*, 5 Mont. 502.

⁴ *Laubenheimer v. McDermott*, 5 Mont. 512. See Section 970.

⁵ *McClure v. Hill*, 36 Ark. 268.

⁶ *Harris v. Lynn*, 25 Kans. 281.

⁷ *Roy v. Goings*, 96 Ill. 361.

unsafe, it is not necessary that a reasonable ground should exist for his belief in his insecurity.¹

§ 984. **Seizing Goods on Execution.**—When a chattel mortgage provides that the mortgagee may, at any time he chooses, take possession of the goods and sell the same in satisfaction of the debt, he may take possession when the goods are seized on execution or attachment against the mortgagor, though the debt is not due, and after such possession taken there is no interest left in the mortgagor subject to execution.²

§ 985. **Answerable for the Use.**—A mortgagee who takes possession of personal property covered by a chattel mortgage before default, and without reasonable cause, is answerable to the mortgagor for the value of any reasonable use to which it is or could have been put. But an injury to a crop resulting from the taking of a mule needed in its cultivation is too remote to be recovered as consequential damages.³

Neither can a mortgagee in possession charge for his own services.⁴

§ 986. **Rights of a Trustee.**—A trustee in a deed of trust of personal property, which was a stock of goods in trade, who takes possession before a levy by an attaching creditor, is entitled to hold the property, in Missouri, for the purpose of the trust, notwithstanding a previous agreement between the *cestui que trust* and the debtor that the debtor might sell the property, in the usual course of business, for his own benefit.⁵

§ 987. **Trover by Mortgagee—Evidence of Conversion.**—In an action of trover brought by the mortgagee against the mortgagor to recover certain goods mortgaged, which were taken upon execution while the property was in the mortgagor's possession, evidence is admissible showing an arrange-

¹ *Werner v. Bergman*, 28 Kans. 60. This is the general rule.

² *Wells v. Chapman*, 59 Iowa 658.

³ *Jackson v. Hall*, 84 N. Car. 489.

⁴ *Blunt v. Syms*, 40 Hun (N. Y.) 566.

⁵ *Dobyns v. Meyers*, 95 Mo. 132.

ment between the mortgagor and the mortgagee by which the mortgagee was entitled to immediate possession of the goods, and had the right to hold the same until the mortgage was due or paid.¹

§ 988. **Replevin by Mortgagee.**—A mortgagee may maintain replevin, after forfeiture, as long as any part of the mortgage debt remains unpaid, for the property wrongfully withheld by the mortgagor. Full payment is a defense, but a set-off is not. Chief Justice English says:

“This is not a bill in chancery to ascertain the mortgage debt, and for decree of foreclosure, but an action of replevin by the mortgagee against the mortgagor for possession of the mortgaged property. After forfeiture the mortgagee may bring replevin for the goods mortgaged, provided any portion of the indebtedness secured by the mortgage is still due and owing to him; and it is no defense to the action to show that a portion of the indebtedness has been paid before the suit, but proof that the entire debt has been discharged is a good defense.”²

In an action of replevin for the property embraced in the mortgage, brought after default and forfeiture, a set-off is not a proper defense.³

§ 989. **May Enter Upon the Land of the Mortgagor.**—Under a power in a chattel mortgage, authorizing the mortgagee on default to take possession without process of law, the mortgagee may enter on the land of the mortgagor and take the chattels against the latter's will, provided he shall not be guilty of a breach of the peace.⁴

§ 990. **Wrongful Seizure.**—In an action to recover goods seized by the mortgagee for breach of condition in selling them, where the mortgagor alleges an oral agreement to per-

¹ *Ganong v. Green*, 64 Mich. 488.

² *Hudson v. Snipes*, 40 Ark. 75; *Marks v. McGehee*, 35 Ark. 218.

³ *Nutwell v. Tongue*, 22 Md. 419; *Fairman v. Fluck*, 5 Watts (Pa.) 516; *McMahan v. Tyson*, 23 Ga. 43; *Reese v. Lyon*, 20 S. Car. 17.

⁴ *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271; *McNeal v. Emerson*, 15 Gray (Mass.) 384.

mit such sales, an instruction ignoring the mortgagor's alleged tender of the proceeds of the sale to the mortgagee was an omission not prejudicial to the mortgagor, as an unaccepted tender could only be material in connection with the oral agreement; the instruction would allow the mortgagor to recover without showing one of the conditions on which his right to sell, under that agreement, depended.¹

A mortgagee has no right to take possession and sell the mortgaged property under a fraudulent mortgage. Thus, if a mortgage is fraudulently altered as to some of the property after delivery, by the mortgagee or his agent, he has no right to take possession of any of the property covered by the mortgage.²

§ 991. **As to Third Parties.**—Where personal property seized by a mortgagee is sold at a formal but abortive foreclosure sale to the mortgagee himself, who retains possession of the property, it does not affect the rights or liabilities of either party to the mortgage, whether the seizure be wrongful or not. If the mortgagee, for just cause, deems himself insecure, and seizes the property, the taking and possession would be rightful by the terms of the mortgage, and he would not be liable to the mortgagor therefor, notwithstanding an abortive foreclosure and sale to the mortgagee, and it follows that if the seizure was rightful it would determine the action, in case of suit, in favor of the mortgagee.³

§ 992. **Pursuing the Wrong Remedy.**—When a mortgagee pursues the wrong remedy to secure his incumbrance, it does not preclude him from asserting his incumbrance against the property in a lawful proceeding. Thus, the fact that a mortgagee brought replevin for the mortgaged chattels which had been taken under execution, and that judgment was rendered against him under the statute, which forbids such

¹ *Holloway v. Arnold*, 92 Mo. 293.

² *Hollingsworth v. Holbrook* (Iowa), 45 N. W. Rep. 561. See Sections 575, 576, 577.

³ *Cushing v. Seymour*, 30 Minn. 301, opinion by Berry, J.

an action in such case, and provides a remedy, does not preclude him thereafter to maintain a bill to foreclose.¹

But when a mortgagee has elected as to what legal remedy he will pursue, and has prosecuted it to judgment, he then waives the other legal remedies. Thus, a mortgagee of chattels attached them and recovered judgment. Afterwards he began an action against a junior mortgagee to recover the chattels which had not been held under the attachment proceedings. It was held that the mortgagee, having once elected between the legal remedies, and prosecuted his action to judgment, could not recover under the mortgage.²

§ 993. **Wrongful Foreclosure.**—In an action of trespass on the case for wrongful foreclosure of a chattel mortgage, the mortgagor may recover under a count in trover for the retention by the mortgagee of a surplus of the proceeds of sale after the debt is satisfied.

Thus, in an action of trespass on the case for unlawfully foreclosing a chattel mortgage, when the declaration alleges that the mortgagee not only took possession of mortgagor's lumber-yard, where the mortgaged property was located, but wrongfully and maliciously, and to injure him, took charge of the entire business and premises, contrary to mortgagor's will, and still holds the same, and entirely excluded the mortgagor, and prevented his carrying on his business, damages for such unlawful holding may be recovered, and the mortgagor may recover on a count in trover for a team, wagons, buggy and harness not accounted for, or any surplus unlawfully withheld from him.³

¹ *Conn v. Bernheimer*, 67 Miss. 498.

² *Dyckman v. Sevaston*, 39 Minn. 132.

³ *Bearss v. Preston*, 66 Mich. 11, opinion by Morse, J.

ARTICLE II.—FORECLOSURE BARRED BY THE STATUTE OF LIMITATIONS.

994. When the Statute Begins to Run Against Mortgagee.

995. Taking Possession After Action and Note are Barred.

§ 994. **When the Statute Begins to Run Against the Mortgagee.**—The statute of limitations begins to run against the mortgagee when a forfeiture has occurred.¹ If the debt be barred by the statute, the remedy upon the mortgage is not necessarily barred. The remedy upon the mortgage continues until a suit as to the property is barred under the law applicable to that.²

Under statute of New Hampshire actions upon notes secured by mortgage may be brought so long as the mortgagee is entitled to bring an action upon the mortgage. If the mortgage be under seal, an action upon the mortgage may be brought within twenty years after the cause of action accrued.³

In North Carolina it is the presumption that the mortgagee has abandoned his right of foreclosure if he permits the mortgagor to remain in possession for more than ten years.⁴

§ 995. **Taking Possession After Action and Note are Barred.**—Where a mortgagee takes possession of the mortgaged property, the fact that the action and the note secured are barred by the statute of limitations does not necessarily give the mortgagor a right of action as for an unlawful seizure.⁵

¹Byrd v. McDaniel, 33 Ala. 18; Joyner v. Vincent, 4 Dev. & B. (N. Car.) 512.

²Almy v. Wilber, 2 Wood. & M. 371; Crain v. Paine, 4 Cush. (Mass.) 483. See, also, Ewell v. Tidwell, 20 Ark. 136; Sullivan v. Hadley, 16 Ark. 129.

³Demeritt v. Batchelder, 28 N. H. 533.

⁴Blake v. Lane, 5 Jones Eq. (N. Car.) 412.

⁵McGowan v. Reid, 27 S. Car. 262.

ARTICLE III.—SALE OF PROPERTY.

- 996. Right of Mortgagee to Sell After Taking Possession.
- 997. The Mortgagee May Take Possession and Sell the Property.
- 998. Selling in Another Place not Named in the Mortgage.
- 999. Sale by Mortgagee Under Insecurity Clause.
- 1000. Selling Contrary to Statute.
- 1001. Giving Notice.
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- 1004. Private Sales.
- 1005. The Property Must Not be Bartered.
- 1006. Sale With Mortgagor's Consent.
- 1007. Sale of Corporation Stock With Mortgagor's Consent.
- 1008. Selling in Parcels.
- 1009. In Case of Fraud.
- 1010. Recovery of Deficiency.
- 1011. Surplus Must be Paid to Mortgagor.
- 1012. Estoppel of Mortgagee.
- 1013. The Mortgagee Cannot Question His Own Sale.
- 1014. Wrongful Sale.
- 1015. Sale Under Power.
- 1016. As to Corporate Stock.
- 1017. Waiving Irregularities of Sale.
- 1018. Foreclosing Junior Mortgagee's Rights.
- 1019. Purchase by Mortgagee at His Own Sale.
- 1020. Effects of Purchase by Mortgagee.
- 1021. Purchasing at Public Sale.
- 1022. Burden of Proof.
- 1023. Accounting for Proceeds.
- 1024. Garnishment of Surplus.
- 1025. No Warranty of Title.
- 1026. Payment of Debt After Mortgagee Takes Possession—Returning of Goods.

§ 996. **Right of Mortgagee to Sell After Taking Possession.**
 —After the mortgagee has taken possession, after forfeiture, he has the legal title and may sell at private sale, when so authorized, and give the purchaser a valid title. If any surplus remains after satisfying his own debt it must be paid to the mortgagor.¹ By giving reasonable notice to the mortgagor he may sell the property, in the absence of any statutory provisions, and cut off the mortgagor's right to redemption.²

¹ *Rose v. Page* (Mich.), 46 N. W. Rep. 227; *Dane v. Mallory*, 16 Barb. (N. Y.) 46; *Flanders v. Chamberlain*, 24 Mich. 305; *Talman v. Smith*, 39 Barb. (N. Y.) 890; *Robinson v. Campbell*, 8 Mo. 365; *Freeman v. Freeman*, 17 N. J. Eq. 44.

² *Huggans v. Fryer*, 1 Lans. (N. Y.) 276; *Broadhead v. McKay*, 46 Ind. 595; *Charter v. Stevens*, 3 Denio (N. Y.) 33; *Chapman v. Hunt*, 13 N. J.

§ 997. **The Mortgagee May Take Possession and Sell the Property.**—A mortgagee who sells the property after taking possession, the mortgagor having an equity of redemption, must account for the value of the property sold.¹ Or, if he uses the goods himself, he must account for them.²

§ 998. **Selling In Another Place Not Named In the Mortgage.**—By agreement of the mortgagor the mortgagee may sell the property in another county from the one named in the mortgage. Thus, a mortgage providing for the sale of goods in a certain county was, by agreement of the parties, changed so as to permit the sale in another county. It was held that the creditors of the mortgagor who garnished the mortgagee subsequently to such agreement could not, in the absence of fraud, have the sale set aside as illegal on account of the change and absence of notice in the first county.³

But when the property is sold in another county than the one where the mortgage was first filed, and the statute requires a refileing in the county where the property is removed, consent of the parties to removal will not waive such refileing. So, a sale by the mortgagee, under the statute, in which he fails to comply with any essential requirement of such statute will render him liable to the mortgagor for the damages which the mortgagor may thereby sustain. A provision in the mortgage that the property may be sold in a county

Eq. 370; *Runyon v. Groshon*, 12 N. J. Eq. 86; *Stoddard v. Denison*, 38 How. Pr. (N. Y.) 296; *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93; *Bryant v. Carson River Lum. Co.*, 3 Nev. 313; *Hall v. Ditson*, 55 How. Pr. (N. Y.) 19; *Wilson v. Brannan*, 27 Cal. 258; *Craig v. Tappin*, 2 Sandf. (N. Y.) Ch. 78; *Johnson v. Vernon*, 1 Bailey (S. Car.) 527; *Denny v. Faulkner*, 22 Kans. 89; *Chamberlain v. Martin*, 43 Barb. 607; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Hart v. Ten Eyck*, 2 Johns. (N. Y.) Ch. 62; *Bryan v. Robert*, 1 Strobb. (S. Car.) Eq. 334; *Ballou v. Cunningham*, 60 Barb. (N. Y.) 425; *Hall v. Bellows*, 3 Stock. 333; *Hulsen v. Walter*, 34 How. Pr. (N. Y.) 385.

The mortgagee has two remedies, either of which he may pursue, at his election. He may resort to a court of equity to compel a redemption or to foreclose the mortgagor's right to redeem, or he may obtain the same object by a fair public sale of the property after due notice to the mortgagor. *Wilson v. Brannan*, 27 Cal. 258.

¹*Craft v. Bullard*, 1 Sm. & M. (Miss.) Ch. 366; *Ballinger v. Worley*, 1 Bibb (Ky.) 195.

²*Craig v. Tappin*, 2 Sandf. (N. Y.) Ch. 78.

³*Tootle v. Taylor*, 64 Iowa 629.

other than that in which the mortgagor resides does not waive the statutory requirement that the mortgage is to be filed in the county where the sale is to take place.¹

§ 999. **Sale by Mortgagee Under Insecurity Clause.**—The words in a mortgage, “feel unsafe and insecure,” under the Nebraska law, do not mean that the mortgagee may exercise arbitrary discretion in the premises, but the mortgagor must be about to do or has done some act which tends to impair the security of the mortgagee before he may seize the property and sell according to the terms in the mortgage.²

A mortgagee selling all of the mortgaged chattels after enough has been sold to pay the debt and costs, is a conversion for which trover will lie.³

After a rightful seizure of the mortgaged property for condition broken, a tender by the mortgagor of the debt and costs does not, under South Carolina law, revest in him either the title or right of possession. He cannot maintain trover thereupon, nor action for claim and delivery, nor to redeem, nor for damages. He can only require an accounting of the proceeds of the sale; whereupon equity will credit the mortgagee not only with the mortgage debt and expenses but also with any unsecured claim.⁴

§ 1000. **Selling Contrary to Statute.**—The Dakota statute requires that a sale by the mortgagee of mortgaged chattels shall be made at public auction. When, therefore, one claiming under a sale known by him to have been private, made by the mortgagee, who had taken possession of the chattels, cannot maintain a claim to the possession thereof as against the mortgagor's lessee under a lease made subsequently to the mortgage.⁵

§ 1001. **Giving Notice.**—The notice of the sale must be

¹ Loeb v. Milner, 21 Nebr. 392.

² Newlean v. Olson, 22 Nebr. 717.

³ Griswold v. Morse, 50 N. H. 211.

⁴ Reese v. Lyon, 20 S. Car. 17; McClendon v. Wells, 20 S. Car. 514.

⁵ Everett v. Buchannan, 2 Dak. 249.

given as specified in the mortgage.¹ The omission to state in the notice whose property is to be sold will not vitiate the sale.² When the usual notice is not less than five days, a sale in two days after taking possession, and at an unusually low price, will vitiate the sale as to a junior mortgagee.³

§ 1002. **Waiving Notice.**—A mortgage provided that, on default, the mortgagee might take possession and sell the property after fifteen days' advertisement by posting notices at certain places. On default the mortgagee took possession and the mortgagor telegraphed him to take stock to another place and sell there. It was held that the mortgagor waived notice at the place stipulated in the mortgage, and that the sale fairly made on two days' notice at the place he designated in the telegram, was valid.⁴

§ 1003. **In Absence of Statutory Provisions, What is a Reasonable Notice.**—To determine the question of reasonable notice to the mortgagor, for making sale of the mortgaged property, without bringing suit, there must be taken into consideration all the circumstances of each case, and a specific reason alleged for want of reasonable notice.⁵

The sale must be fair and just and the mortgagor allowed the full value of the property sold.⁶

§ 1004. **Private Sales.**—If a power of sale does not require the giving any notice of the sale, the mortgagee can make a valid sale either at public or private sale, if not contrary to statute, and need not give notice unless he so chooses, providing the sale is fair.⁷ After taking possession he has the legal title and may make a private sale of the property if not otherwise bound by stipulations in the mortgage.⁸

¹ *Waite v. Dennison*, 51 Ill. 319.

² *McConnell v. Scott*, 67 Ill. 274.

³ *Bendel v. Crystal Ice Co.*, 82 Cal. 199.

⁴ *Darnall v. Darlington*, 28 S. Car. 255.

⁵ *Wilson v. Brannan*, 27 Cal. 258.

⁶ *Bird v. Davis*, 14 N. J. Eq. 467; *Freeman v. Freeman*, 17 N. J. Eq. 44.

⁷ *Wylder v. Crane*, 53 Ill. 490.

⁸ *McConnell v. People*, 84 Ill. 583; *Waite v. Dennison*, 51 Ill. 319; *Hungate v. Reynolds*, 72 Ill. 425; *Rose v. Page* (Mich.), 46 N. W. Rep. 227.

§ 1005. **The Property Must Not be Bartered.**—The power of sale must be strictly followed, and the mortgagee, after taking possession, cannot barter or exchange the property. The mortgagor is entitled to a sale for money, that he may know whether there be any surplus.¹

The mortgagee must follow the power given in the mortgage. If he does not, and any loss thereby accrues, he will be responsible and must bear the loss.²

§ 1006. **Sale With Mortgagor's Consent.**—If a mortgagor gives his consent to the sale of the property he thereby waives his right to redeem, and the purchaser's title is unassailable by the mortgagor's creditors unless they had a lien on the property at the time of the sale.³ Or if the mortgagor stands by and sees the property sold by the order of the mortgagee, and the proceeds applied to extinguishing the mortgage debt, he is estopped from attacking the sale.⁴

§ 1007. **Sale of Corporation Stock With Mortgagor's Consent.**—A sale of stock in a corporation under a power of sale contained in the mortgage cuts off the mortgagor's right of redemption, provided he was informed of the intended sale and he sanctioned it.⁵

§ 1008. **Selling in Parcels.**—It is the general rule that if the mortgaged property consists of a large amount of many different articles, which can be easily and profitably sold separately, or in lots or parcels suitable to the convenience of the bidders, a sale of them in a whole lump, or in two separate lumps, may, in some cases, be regarded as an unfair mode of sale, especially if the property does not bring its actual or market value. Judge Horton, delivering the opinion of the court, says: "The unfair or fraudulent sale of mortgaged property by a mortgagee should not and will not defeat or extinguish the rights of the mortgagor. The

¹ *Edwards v. Cattrell*, 43 Iowa 194.

² *Beckley v. Munson*, 22 Conn. 299.

³ *Talman v. Smith*, 39 Barb. (N. Y.) 390.

⁴ *McConnell v. People*, 71 Ill. 481.

⁵ *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

mortgagee has no right, by any unfairness, to sacrifice the property and deprive the mortgagor of the surplus over the debt which, by a fair and honestly-conducted sale, might arise. If the property consists of many different articles, which can be easily offered for sale separately or in lots or parcels, a sale of the whole in a lump or in two lumps, in some cases, might be regarded as an unfair mode of sale, especially if it were shown that the property brought much less at the sale than its actual value."¹

So, if the mortgage covers much more property than is necessary to the security, and the mortgagee, under the terms of his mortgage, takes possession of the whole, but could, without prejudice or great inconvenience to himself, satisfy his debt by a sale of part, and the interest of the mortgagor requires it, he must so sell.²

§ 1009. **In Case of Fraud.**—A collusion by the mortgagee and the purchaser, whereby the property is sold for an inadequate price, will vitiate the sale. When the mortgagor has a valuable interest in the property, and the sale by the mortgagee to a purchaser, for an inadequate consideration, with intent to defraud the creditors, the purchaser having knowledge of the intended fraud, the sale will be set aside.³ And a promissory note given by the mortgagor to the mortgagee, to induce him to exercise the power of sale for the purpose of delaying the mortgagor's creditors and preventing the property coming to their use, is fraudulent and void.⁴ But if the mortgagee carries out in good faith the terms of the mortgage and makes the very disposition which he has contracted to make, he has broken no contract, he has been guilty of no bad faith to the mortgagor and is chargeable with only the actual proceeds of the property thus disposed of by him.⁵

¹ *Wygall v. Bigelow*, 42 Kans. 477; *Hannah v. Carrington*, 18 Ark. 85; *Hungate v. Reynolds*, 72 Ill. 425; *Leach v. Kimball*, 34 N. H. 568.

² *Stromberg v. Lindberg*, 25 Minn. 513.

³ *Robinson v. Bliss*, 121 Mass. 428, opinion by Ames, J.

⁴ *Gordon v. Clapp*, 113 Mass. 335.

⁵ *Denny v. Van Dusen*, 27 Kans. 437.

§ 1010. **Recovery of Deficiency and Surplus.**—When the property sold falls short of satisfying the debt, the mortgagee may have a decree for the residue when he forecloses in court, or, if there be a surplus, it must be paid to the mortgagor. If the mortgagee sells the property himself, according to the terms of the mortgage, in case of deficiency, an action at law to recover the remainder of the debt will lie; or, if there be a surplus, the mortgagor may sue for it.¹

When the property is sufficient to satisfy the debt no further act besides taking possession by the mortgagee is necessary, unless otherwise stipulated.²

The mortgaged property, after default, is taken possession of by the mortgagee for the purpose of being appropriated for the satisfaction of the debt, and the mortgagor has the right to have it faithfully and fairly applied for that purpose. The mortgagee has no right, by any unfairness, to sacrifice the property and deprive the mortgagor of the surplus over the debt, which, by a fair and honestly-conducted sale, might arise.³

§ 1011. **Surplus Must Be Paid to the Mortgagor.**—If the mortgagee sells the property according to statute, he is responsible to the mortgagor for only the surplus of the proceeds of such sale above the debt, interest and costs.⁴ If the mortgagee converts the property to his own use, without selling, so that it cannot be redeemed in kind, the mortgagor is entitled to redeem, and the court will enter a decree against the mortgagee for the excess of the value of the property over the amount of the mortgage debt.⁵

§ 1012. **Estoppel of Mortgagee.**—A mortgagee who avails himself of his right of taking possession of the property “for further security,” and electing to treat the whole debt as due, makes a sale, is estopped to set up a defense to an

¹ *Bryan v. Robert*, 1 Strobb. (S. Car.) Eq. 334.

² *Case v. Boughton*, 11 Wend. (N. Y.) 106.

³ *Hungate v. Reynolds*, 72 Ill. 425.

⁴ *Denny v. Faulkner*, 22 Kans. 89.

⁵ *Flanders v. Chamberlain*, 24 Mich. 305.

action of trover by the mortgagor, that at the time the sale was made, the debt had not matured. The conversion having been established, he cannot complain that it was error to apply the value of the property sold to the extinguishment of the debt with interest to maturity.¹

§ 1013. **The Mortgagee Cannot Question His Own Sale.**—A mortgagee cannot call in question the regularity of his own sale, when neither the mortgagor nor any one interested under him makes objection.²

And where one has taken the legal title to goods to secure himself as security on the owner's bond, but has never been in possession, attempts to transfer the goods to another before a breach in the conditions of the bond, his attempted transfer amounts only to a waiver of his lien without passing any title by the transfer. Judge Vann says: "Where one takes title simply to secure himself against loss as security upon a bond, he has no interest that he can sell until after breach in the condition of the bond. His title is both personal and contingent, and by an assignment before the contingency named has happened, he parts with his security without transferring any right to his assignee."³

§ 1014. **Wrongful Sale.**—A wrongful sale of mortgaged stock by the assignee is a conversion for which trover will lie; but such action being barred in six years, under the Alabama Code,⁴ equity will not relieve against it after that time.⁵ And when the mortgage stipulates that the mortgagee may purchase at his own sale, if he sells at an unreasonable price, and without the usual notice to the mortgagor, as required by statute, the sale will be void.⁶

§ 1015. **Sale Under Power.**—Where a chattel mortgage empowers the mortgagee on default to sell the property and

¹ *Harder v. Hosp*, 69 Wis. 288.

² *Massey v. Harding*, 81 Ill. 330; *Williams v. Hatch*, 38 Ala. 338.

³ *Comley v. Dazian*, 114 N. Y. 161.

⁴ Code, § 3226.

⁵ *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

⁶ *Bendel v. Crystal Ice Co.*, 82 Cal. 199.

apply the proceeds in liquidation of the mortgage debt, the purchase by the mortgagee of part of the property at a sale under such power; made without resorting to court, does not waive his right to look to the mortgagor on other securities for any deficiency, and is not a defense to a suit of foreclosure of a mortgage on real estate for the same debt.¹

§ 1016. **As to Corporate Stock.**—A mortgage of corporate stock authorized the mortgagee and his assigns to sell and transfer the mortgagor's interest; the mortgagee assigned the note secured to a bank and gave its cashier written authority to sell the stock. It was held that a sale by such cashier was a valid execution of the power of sale, both by terms of the mortgage² and under the Code.³

§ 1017. **Waiving Irregularities of Sale.**—If a wrongful sale of the mortgaged property is made with the consent of the mortgagor, all irregularities are waived, and the sale is equivalent to a formal foreclosure.⁴

Though the mortgagor may waive the statutory demand of payment, and the mortgage stipulates that the mortgagee may purchase at the sale, yet a sale at \$1,000, when the property is worth \$5,000, and at a two days' notice instead of the usual notice of five days, will not be upheld.⁵

§ 1018. **Foreclosing Junior Mortgagee's Rights.**—A mortgagee held a senior mortgage on a horse, and, under agreement with the mortgagor, sold the horse for full value at private sale, crediting the proceeds on the mortgage debt. It was held that such sale foreclosed all rights of the junior mortgagee.⁶

Where a senior mortgage has been foreclosed and the property bought by the mortgagee at a valid sale regularly made, the price paid, in the absence of fraud, conclusively

¹ *Lee v. Fox*, 113 Ind. 98.

² *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

³ Code, § 3226.

⁴ *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

⁵ *Bendel v. Crystal Ice Co.*, 82 Cal. 199.

⁶ *Faeth v. Leary*, 23 Nebr. 267.

fixes the value of the property, and a junior mortgagee cannot, by showing that the property did not sell for its full value, have the first mortgage satisfied to any larger amount than the price paid.¹

§ 1019. **Purchase by Mortgagee at His Own Sale.**—Generally, the purchase by the mortgagee at his own sale is not binding on the mortgagor or his creditors, unless specially authorized by the agreement of the parties or by statute. If he does so purchase and appropriates the property to his own use, he must account for its value.² Neither can he legally acquire title to the property by purchasing through the agency of a third party.³ But if the mortgage gives the right to purchase, then he can legally do so.⁴

In some States, however, the mortgagee of the chattel may purchase at his sale under the mortgage, but then the relation which the mortgagee holds to the debtor imposes on him the observance of fairness and good faith. If he abuses the power which he holds and becomes the purchaser unfairly and dishonestly, he will be required to account to the mortgagor therefor.⁵

§ 1020. **Effects of Purchase by Mortgagee.**—If a mortgagee of chattels purchases them at public sale, in good faith, at a fair valuation, under the mortgage, he has the right of ownership as long as the sale is permitted to stand.⁶ And the mortgagor may lose his right to intervene by sleeping on his rights. Thus, where a mortgagee purchases at his own sale, and the mortgagor, during nine years, fails to interpose objections by offering to pay the debt, a subsequent purchaser from him cannot exercise that option for him.⁷

¹ *Dehority v. Paxon*, 115 Ind. 124.

² *Korns v. Shaffer*, 27 Md. 83; *Imboden v. Hunter*, 23 Ark. 622; *Webber v. Emmerson*, 3 Colo. 248; *Waite v. Dennison*, 51 Ill. 319.

³ *Phares v. Barbour*, 49 Ill. 370; *Pettibone v. Perkins*, 6 Wis. 616; *Alger v. Farley*, 19 Iowa 518.

⁴ *Hannah v. Carrington*, 18 Ark. 85.

⁵ *Jones v. Franks*, 33 Kans. 497; *Wygol v. Bigelow*, 42 Kans. 477. See, also, *Bendel v. Crystal Ice Co.*, 82 Cal. 199.

⁶ *Syfers v. Bradley*, 115 Ind. 345.

⁷ *Boutwell v. Steiner*, 84 Ala. 307.

When the property is unlawfully converted by the mortgagee, or he has unlawfully disposed of a great portion of it, so that the mortgagor cannot redeem and the chattels cannot be returned on payment of the debt, in an action for damages by the mortgagor against the mortgagee, the former is entitled to a judgment for the excess of the value of the personal property over the amount of the indebtedness, with interest.¹

Judge Horton, of the Kansas Supreme Court, says: "Some of the courts hold that relief can be granted only to a mortgagor upon payment or tender of payment of the whole mortgage debt, and then, although the mortgagee has disposed of the property, a court of equity will give relief by decreeing damages. But in this State the distinction between courts of equity and courts of law has been abolished, and it were useless and unnecessary to tender any payment of the mortgage debt if the plaintiff has unlawfully, fraudulently and unfairly converted to his own use the personal property of the defendants, of a much greater value than the debt, and subsequently to such conversion has disposed of large portions of the property, so as to be disabled from returning the same or allowing any redemption thereof."²

§ 1021. **Purchasing at Public Sale.**—A mortgagee of personal property is not within the rule which prohibits a trustee from purchasing at a public sale under a power in the mortgage, provided he acts in good faith.³ And when such sales are to be tested or invalidated, the mortgagor is the party most directly interested, and the validity of the sale cannot be impeached without his consent, or, at least, without giving him an opportunity to be heard. He must be made a party to the proceedings.⁴

A mortgagee who has taken possession of the property

¹ *Leach v. Kimball*, 34 N. H. 568; *Hungate v. Reynolds*, 72 Ill. 425.

² *Wygall v. Bigelow*, 42 Kans. 477.

³ *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Emmons v. Hawn*, 75 Ind. 356; *Maxwell v. Newton*, 65 Wis. 261; *Richards v. Holmes*, 18 How. (U. S.) 143; *Edmiston v. Brucker*, 40 Hun (N. Y.) 256.

⁴ *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Lee v. Fox*, 113 Ind. 98.

after default, and causes it to be sold as per stipulations in the instrument, to satisfy the debt, may buy it through an agent and thereby acquire an indefeasible title.¹

The purchase by the mortgagee of the mortgaged property, in good faith, on the foreclosure of his chattel mortgage, does not invalidate nor prevent him from acquiring a title freed from the mortgagor's right to redeem.²

§ 1022. **Burden of Proof.**—The most that could be held in case the mortgagee became a purchaser at his own sale made under a power, would be to cast upon him the burden of showing that the sale was fairly and openly made, in strict compliance with the power, and that the price paid was not so clearly and grossly disproportioned to the value of the property as to raise a presumption of fraud or bad faith.³

§ 1023. **Accounting for the Proceeds.**—The mortgagee must make an accounting for the proceeds of the sale of the mortgaged property to the mortgagor. Thus, where a debtor conveys his property to his wife in payment of his debt to her, and she then turns it over to a bank under a chattel mortgage, she having to pay it and other debts of her husband to the bank, and the mortgage stipulates that the holder should account for any balance remaining after payment, the bank must account for the residue of the property after payment of its claim.⁴

The mortgagee of a stock of goods on non-payment took possession and carried on the business, making sales and purchasing additional stock. In an accounting it was held that he should be charged with the sums received for all sales, whether out of the original stock or the additions. He should be credited with the amount of the loan and interest, also with costs of all goods added to the stock, and

¹ French v. Powers, 120 N. Y. 128, opinion by Follett, J.

² Casserly v. Witherbee, 119 N. Y. 522.

³ Lee v. Fox, 118 Ind. 98.

⁴ Cooper v. Nat. Bank, 40 Kans. 5.

the expense of carrying on the business, and a balance struck.¹

Where a mortgagee of goods takes possession and sells at private sale he must account to the other creditors of the mortgagor for the value of the goods as determined by the jury.²

Where a mortgagee takes possession and purchases at his own sale, made under a power, and it appears that the price was grossly inadequate or that the property was sacrificed, the sale should be set aside at the election of the mortgagor, and if the mortgagee converts the property after a merely colorable sale, or denies the mortgagor the right to redeem, he should be held to account for its fair value at the time of the appropriation.³

§ 1024. **Garnishment of Surplus.**—When a mortgagee of personal property sells of the same sufficient to pay the mortgage debt and charges, and then has a surplus left in his possession, such mortgagee is liable to answer in garnishment for such goods or surplus in an action by a creditor of the mortgagor.⁴

But when the mortgagee is in possession of the property, and has not made any sale of the property, he is not subject to garnishment, because it could not be definitely told that the property would be more than enough to pay the mortgage debt, or that it might not be lost or destroyed and nothing be realized.⁵

§ 1025. **No Warranty of Title by Mortgagee.**—A sale of chattels under mortgage by the mortgagee, does not imply a warranty of title. Thus, where a mortgagee of personal property sells it, not as his own, but as held by him as a mortgagee, he does not thereby warrant the title. The rule *caveat emptor* applies to all persons desiring to purchase

¹ Burr v. Dana, 72 Wis. 639.

² Lininger v. Herron, 23 Nebr. 197.

³ Lee v. Fox, 113 Ind. 98.

⁴ Bragunier v. Beck & Corbett Iron Co., 41 Kans. 543.

⁵ Dieter v. Smith, 70 Ill. 168.

under such circumstances, and the purchaser obtains only the interest of the mortgagor and mortgagee in the property. Judge Valentine, speaking for the court, held that when a mortgagee publicly proclaims at the time of the sale that he offers the property for sale under a 'chattel mortgage, and as the mortgagee, there is no implication that he warrants the title.¹

So, Mr. Schouler says: "So, too, the sale by the pledgee or mortgagee of a chattel, as such, purports to transfer only the peculiar title of a pawnbroker, pledgee or mortgagee; and the circumstances must repel any inference that a warrant of title as owner is intended, though the title thus originating may have ripened into a common one; and in the absence of express warranty of title, or fraudulent conduct, the transaction will be taken accordingly."²

So, Mullin, P. J., says: "Upon the sale of property, by virtue of a chattel mortgage, the proceeding is notice to the public that the mortgagee is selling not his own title to the property, but that which he has acquired through the mortgage, and no warranty of title to the property so sold is to be implied against the mortgagee."³

§ 1026. Payment of Debt After Mortgagee Takes Possession—Returning of Goods.—Where a mortgagee takes the mortgaged goods into his possession after default, but tenders them back to the mortgagor upon the payment of the debt by the latter, the mortgagor cannot insist upon their being returned to him. He must take them at the place where the mortgagee has stored them for safe keeping.⁴

¹Harris v. Lynn, 25 Kans. 281.

²2 Schoul. Per. Prop. 338.

³Sheppard v. Earles, 13 Hun (N. Y.) 651; and see 1 Chitty on Cont. 626, note 10; Rudderow v. Huntington, 3 Sandf. (N. Y.) 252.

⁴Gale Man. Co. v. Phillips, 78 Mich. 86.

ARTICLE IV.—FORMAL FORECLOSURE IN COURT.

- 1027. The Mortgagee May Proceed With Concurrent Remedies.
- 1028. Providing for Mortgagee's Expenses in Foreclosing.
- 1029. Holding Several Collaterals.
- 1030. Remedy at Law and Equity Pursued at the Same Time.
- 1031. A Mortgagee May Release the Mortgage Without Affecting his Personal Claim.
- 1032. Personal Liability.
- 1033. Acknowledgment of Indebtedness.
- 1034. To Secure Purchase-Money.
- 1035. When an Action Will Not Lie.
- 1036. Election of Remedies.
- 1037. Right of Attachment.

§ 1027. **The Mortgagee May Proceed With Concurrent Remedies.**—A mortgagee may proceed concurrently with an action on his note, and with lawful proceedings, to foreclose the mortgage.

Judge Endicott says: "It is contended by the plaintiff that there was no foreclosure, because the defendant was pursuing a concurrent remedy at the time by an action at law upon the note. But a mortgagee has the right to do this. He may proceed concurrently with an action on his note, and with lawful proceedings, to foreclose his mortgage. This has repeatedly been held in regard to mortgages of real estate, and, from the nature of the contract, the rule is equally applicable to mortgages of personal property."¹

And a mortgage being a specific lien, and a judgment a general lien, both may be pursued consistently until the debt is satisfied. The doctrine of election does not apply in such cases. Of course a creditor shall not have two satisfactions for the same debt, but there is no inconsistency in his pursuing two remedies, because if one produces satisfaction that is a bar to the other.²

And in general the commencement of a suit upon a prom-

¹ *Burtis v. Bradford*, 122 Mass. 129. See, also, *Ely v. Ely*, 6 Gray (Mass.) 439; *Draper v. Mann*, 117 Mass. 439; *Pettibone v. Stevens*, 15 Conn. 19; *Johnson v. Murphy*, 17 Tex. 216.

² *Satterwhite v. Kennedy*, 3 Strob. (S. Car.) L. 457.

issory note does not extinguish the lien of a chattel mortgage held as collateral security.¹

§ 1028. **Providing for Mortgagee's Expenses in Foreclosing.**—A mortgagee can take from the proceeds all necessary expenses in foreclosing the mortgage. Thus, where a mortgage provides for the reimbursement of the necessary expenses, and also those incurred by the mortgagee in obtaining possession of the property, he can reimburse himself for all necessary expenses in gaining possession by replevin.²

If he begins a suit at law, and afterwards forecloses in equity, the costs of the suit at law become part of the mortgage debt.³

And in an action by a mortgagee against a third person to recover the amount of a note secured by a chattel mortgage, on the ground that the defendant tortiously converted the mortgaged property, the mortgagee can recover attorney's fees and interest on the whole, though it appears that part of the property was sold by mortgagor to defendant with the agreement that he would satisfy the mortgage out of the proceeds of the sale.⁴

§ 1029. **Holding Several Collaterals.**—When a mortgagee receives a note of a third person from his debtor as a pledge or collateral security, greater than his own claim, he may still maintain an action on his own note without previously restoring the note received as collateral security.⁵

¹ *Thurber v. Jewett*, 3 Mich. 295. See *Chapman v. Clough*, 6 Vt. 123.

By the commencement of a suit upon the note secured by a chattel mortgage, the forfeiture of the condition of the mortgage is waived. He indicates by this act of bringing suit on the note that he does not hold the property in satisfaction of his debt. "It seems just to allow the mortgagor to pay him, and thereby discharge the mortgage, instead of permitting the mortgagee to collect the debt by a suit on the note, and at the same time retain the property bound in this mortgage, and turn the mortgagor over to his uncertain remedy in equity. By holding the suit on the note to be a waiver of the forfeiture of the condition of the mortgage, all the securities, as well as the remedies thereon which the mortgagee ever had, are preserved to him so far forth as they may be necessary to produce actual payment of his debt." *Thurber v. Jewett*, 3 Mich. 295. See, also, *Cutts v. York Manuf. Co.*, 14 Me. 326.

² *Morris v. Tillson*, 81 Ill. 607.

³ *Pettibone v. Stevens*, 15 Conn. 19.

⁴ *De Costa v. Comfort*, 80 Cal. 507, opinion by Works, J.

⁵ *Chapman v. Clough*, 6 Vt. 123.

A creditor may hold an unlimited number of collaterals and avail himself of any so long as the debt remains unpaid.¹

§ 1030. **Remedy at Law and Equity Pursued at the Same Time.**—A mortgagee may pursue his remedy upon the mortgage at law and equity at the same time. He may maintain an action of replevin or detinue for the property, or trover for the conversion of it, while a bill is pending in equity to foreclose the mortgage.²

§ 1031. **A Mortgagee May Release the Mortgage Without Affecting His Personal Claim.**—A mortgagee may release the mortgage and yet hold the debt against the mortgagor on the note.

Thus, where a firm is dissolved, and a payee of a note made by the firm has received from the new firm organized, a chattel mortgage of the partnership property sufficient, if applied, to satisfy the mortgage, and made with the assent of the retiring partner, the mortgagee may release the mortgage and restore the property to the new firm without impairing his rights against all the joint obligors on the note.³ But if a creditor should, in such case, give up securities in his hands and take those of the new firm, or release a levy made without the consent of the retiring partner, then the retiring partner would be discharged from the lien of the mortgage and the securities thus given up.⁴

§ 1032. **Personal Liability.**—The terms of a chattel mortgage may be such as to create no personal liability against the mortgagor. Thus, where a chattel mortgage contains no agreement to pay the sum secured thereby, and no recital or declaration of indebtedness from the mortgagor to the mortgagee, no action will lie by the mortgagee upon the mortgage to recover the debt secured.⁵ There is, therefore, no

¹ *Ayers v. Watson*, 57 Pa. St. 360.

² *Ambler v. Warwick*, 1 Leigh (Va.) 195; *Jones v. Henry*, 3 Litt. (Ky.) 47.

³ *Rawson v. Taylor*, 30 Ohio St. 389.

⁴ *Harris v. Lindsay*, 4 Wash. C. C. 271; *Bedford v. Deakin*, 2 Barn. & Ald. 210.

⁵ *Weed v. Covill*, 14 Barb. (N. Y.) 242.

implied covenant to pay anything. It is merely a mortgage without any personal liability.¹

Where the mortgaged property has been taken away from both parties to the mortgage, by title paramount, then the mortgage does not operate to discharge or otherwise affect the notes given as between the parties; but such notes stand valid contracts between the parties as simple contract debts, in the same condition as if no collateral security had been given.² Such a mortgage has no effect upon the notes. The rule of law is, that when personal property mortgaged or consigned with a power in the mortgagee or consignee, in law or by force of the contract, to sell the mortgaged property if not redeemed, and apply the proceeds to the payment of the debt, it does not inure by way of actual payment until the property is sold and the money realized, or the mortgage foreclosed and the mortgaged goods become the absolute property of the mortgagee.³

§ 1033. **Acknowledgment of Indebtedness.**—Where, in a chattel mortgage, the mortgagor acknowledges his indebtedness to the mortgagee in a sum certain, and declares that for the purpose of securing the payment thereof he transfers the property specified in the instrument, the mortgagee, on default of payment, may bring his action, and is not bound in the first instance to resort for satisfaction to the property.

The remedy by action to recover, in such a mortgage, the debt after default, exists in full force, unless taken away by stipulation in the mortgage.⁴

§ 1034. **To Secure Purchase-Money.**—The acceptance of a mortgage of chattels by the mortgagee, with power to sell on default of payment, taken on the sale of chattels, does not destroy the right of action to recover the purchase-money; the simple contract is not merged in the mortgage,

¹ *Culver v. Sisson*, 3 Comst. (N. Y.) 264.

² *Whitney v. Willard*, 13 Gray 203.

³ *Rice v. Catlin*, 14 Pick. 221.

⁴ *Elder v. Rouse*, 15 Wend. (N. Y.) 218.

it being deemed to be collateral security. It is not necessary that a note or bond shall be given to preserve such a debt; it exists and continues in full force without such personal security. A mortgage is given as collateral security, and does not merge the demand.

The debt is the principal, the mortgage the incident, and the latter can never merge the former.¹ The legal presumption is that a mortgage is always taken as collateral security, though the debt rests in simple contract.² And even a collateral security of a higher nature does not extinguish the original contract so long as it remains unsatisfied.³

§ 1035. **When an Action Will Not Lie.**—An action of debt will not lie upon a chattel mortgage to recover the sum of money secured thereby, unless the instrument contains an express agreement to pay the sum, or a distinct acknowledgment of an existing debt. Thus, a chattel mortgage was given under seal, but it contained no express covenant to pay the money, nor any acknowledgment, except that the instrument was declared to be executed for the purpose of securing the payment of a certain sum.

There was a proviso, however, that the instrument should cease and be void on payment of the sum; and in case of default the mortgagee was authorized to sell the goods and apply the proceeds in payment, rendering the overplus to the mortgagor. It was held that debt would not lie upon the instrument.⁴

When an instrument contains no express covenant to pay money, and the mortgagor does not bind himself by an express acknowledgment of an indebtedness to the mortgagee, it must fail and no action of debt will lie. The instrument must contain a clear and unequivocal recognition of a debt due from the mortgagor to the mortgagee, in order

¹ *Sterling v. Rogers*, 25 Wend. (N. Y.) 658.

² *Jackson v. Sackett*, 7 Wend. (N. Y.) 94.

³ *Day v. Leal*, 14 Johns. (N. Y.) 404.

⁴ *Culver v. Sisson*, 3 Comst. (N. Y.) 264.

that the mortgagee may bring an action of debt on the instrument against the mortgagor.¹

But if the debt is expressly acknowledged to be due, on the face of the instrument, then an action will lie against the mortgagor.²

§ 1036. **Election of Remedy.**—The mortgagee is not confined to any special security, and in the absence of any agreement, may attach or levy an execution upon the other property of the mortgagor.³ If he attaches the mortgaged goods he thus waives his claim under the mortgage.⁴ He can make such attachment after having taken the property into his possession under the mortgage.⁵ Selling mortgaged goods upon execution is a waiver of the mortgage lien.⁶

§ 1037. **Right of Attachment.**—A mortgagee may waive his lien under the mortgage and attach the same property in a suit at law.⁷ He can make this attachment even after taking possession under his mortgage.⁸

¹ *Briscoe v. King*, Cro. Jac. 281; *Suffield v. Baskeroil*, 2 Mod. 36; *Smith v. Stewart*, 6 Blackf. (Ind.) 162; *Scott v. Field*, 7 Watts (Pa.) 360; *Drummond v. Richards*, 2 Munf. (Va.) 337; *Salisbury v. Phillips*, 10 Johns. (N. Y.) 57.

² *Elder v. Rouse*, 15 Wend. (N. Y.) 218.

³ *Taylor v. Cheever*, 6 Gray (Mass.) 146; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482.

⁴ *Buck v. Ingersoll*, 11 Met. (Mass.) 226; *Whitney v. Farrar*, 51 Me. 418; *Dyckman v. Sevaston*, 39 Minn. 132.

⁵ *Libby v. Cushman*, 29 Me. 429.

⁶ *Kimball v. Marshall*, 8 N. H. 291; *Swett v. Brown*, 5 Pick. (Mass.) 178. See Section 992.

⁷ *Whitney v. Farrar*, 51 Me. 418; *Buck v. Ingersoll*, 11 Met. (Mass.) 226; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Taylor v. Cheever*, 6 Gray (Mass.) 146; *Whitwell v. Brigham*, 19 Pick. (Mass.) 117.

⁸ *Libby v. Cushman*, 29 Me. 429.

ARTICLE V.—IN EQUITY.

- 1038. General Principles.
- 1039. When the Mortgage Contains a Power of Sale.
- 1040. Rights of Junior Mortgagee.
- 1041. Property Taken Beyond the Jurisdiction of Court.
- 1042. Appointment of Receiver.
- 1043. Right of Simple Contract Creditor.
- 1044. Rule as to Appointment.
- 1045. Several Mortgages—Amount of Debt in Dispute.
- 1046. Parties to the Suit.
- 1047. Mortgagor Without any Interest.
- 1048. Payment of Debt in Specific Articles.

§ 1038. **General Principles.**—A mortgagee may go into equity to compel a speedy redemption or to foreclose the right of the mortgagor. The same object may be attained by a fair sale of the property on due notice to the mortgagor. These are familiar principles wherever the relation of mortgagor and mortgagee exists.¹

Chancellor Green says: "The right of a mortgagee of chattels to come into equity to obtain a foreclosure of the equity of redemption and a sale of the chattels, and also to protect the property from conversion or destruction until a sale be effected, is well settled. In many cases the remedy in equity is more complete and effectual than at law. If the mortgagee retains the chattels they are always liable to redemption by the mortgagor. His only right to them is to satisfy his debt. When that is satisfied his title ceases."²

The judicial sanction of the transaction is safer, and, when the amount is large, sometimes advisable, especially in the absence of statutory regulations. The conduct and fairness of the sale, and the rights acquired under it, are always open to investigation at the instance of the mortgagor.³ It is true,

¹ *Charter v. Stevens*, 3 Denio (N. Y.) 33; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *White v. Cole*, 24 Wend. (N. Y.) 116; *Conard v. At. Ins. Co.*, 1 Pet. (U. S.) 441; *Morris v. Tillson*, 81 Ill. 607; *Aldrich v. Goodell*, 75 Ill. 452; *Hammers v. Dole*, 61 Ill. 307; *Wylder v. Crane*, 53 Ill. 490; *Packard v. Kingman*, 11 Iowa 219; *Broadhead v. McKay*, 46 Ind. 595; *Brown v. Greer*, 13 Ga. 285.

² *Freeman v. Freeman*, 17 N. J. Eq. 46; *Doughten v. Gray*, 2 Stock. (N. J.) 323.

³ *Morris v. Fisher*, 1 Stock. (N. J.) 667; *Morris v. Lewis*, 1 Beas. (N. J.) 323.

however, that the title of the mortgagee to chattels mortgaged is absolute at law after forfeiture, and that he may sell them for the satisfaction of his debt, without the aid of a court of equity.¹

§ 1039. **When the Mortgage Contains a Power of Sale.**—The fact that a deed of trust or mortgage contains a power of sale and contemplates a foreclosure without the aid of a court, does not preclude a resort to a chancery court for the purpose of foreclosure.²

An action in equity lies to foreclose a chattel mortgage. The remedy by sale under the power, without resorting to judicial proceedings, is in most cases a more speedy and effectual means of extinguishing the equity of redemption, but the right to foreclose by action has not been taken away.³

§ 1040. **Rights of Junior Mortgagee.**—A junior mortgagee of part of the property embraced in a prior mortgage may, after exhausting other securities for his satisfaction, file a bill in equity against the prior mortgagee for the purpose of subjecting such property to his lien, by compelling him to foreclose and resort to the other property embraced in his mortgage.⁴ And on a bill of foreclosure by the first mortgagee, subsequent mortgagees may, for the purpose of reducing the claim of the plaintiff, insist upon the just and faithful application of a collateral security in his hands, to which they are not parties.

When chattel security of the first mortgagee consists of certain chattels assigned to him and others, some of which were attached and taken out of his possession by the creditors of the assignor, and he thereupon brought suit in trespass against such creditors, in which he was ultimately defeated,

¹ Hall v. Bellows, 3 Stock. (N. J.) 334; Long Dock Co. v. Mallery, 1 Beas. (N. J.) 94; 4 Kent's Com. 139; Story on Bailm. § 310, note 4.

² Green v. Gaston, 56 Miss. 748.

³ Briggs v. Oliver, 68 N. Y. 336; Hart v. Ten Eyck, 2 Johns. (N. Y.) Ch. 99; Slade v. Rigg, 3 Hare 35; Packard v. Kingman, 11 Iowa 219; McDonald v. Vinson, 56 Miss. 497.

⁴ Hannah v. Carrington, 18 Ark. 85; High v. Brown, 46 Iowa 259; Richards v. Spicer, 23 Minn. 212.

the action being in good faith, for the benefit of the assignees, such expense becomes part of the mortgage debt.¹

§ 1041. **Property Taken Beyond the Jurisdiction of Court.**—Where the property is within the jurisdiction of the court but was taken beyond such jurisdiction by another person, who refuses to return it, the court may decree that the person in possession shall pay its value.²

§ 1042. **Appointment of Receivers.**—A receiver is never to be appointed over a mortgagee in possession where the mortgagee swears to a balance due him, much less when the plaintiff himself states such balance, and that the pledge is not an inadequate security to such balance.³

§ 1043. **Right of Simple Contract Creditor.**—It is well settled that a receiver is never to be appointed over a mortgagee in possession where he swears to a balance due him; much less where the mortgagor himself states such balance, and that the property is not an inadequate security for such balance.⁴ In this view of the case, there being no allegation of danger or irresponsibility on the part of the mortgagee in whose possession the property is, there can be no reason for restraining him from selling the same to reimburse himself for his advances; or for appointing a receiver to take the same out of his possession, and make sale thereof, and keep the proceeds until the accounts are finally settled between the parties.⁵

And in general a simple contract creditor cannot have an injunction to restrain even a fraudulent disposition of property; much less to restrain it in the possession of the alleged debtor, or place it in the hands of a receiver.⁶

§ 1044. **Rule as to Appointment.**—A receiver may be ap-

¹ *Pettibone v. Stevens*, 15 Conn. 19.

² *Gaar v. Hurd*, 92 Ill. 315. See, also, *Hungate v. Reynolds*, 72 Ill. 425.

³ *Quinn v. Brittain*, 3 Ed. (N. Y.) Ch. 314; *Patton v. Access. Trans. Co.*, 4 Abb. (N. Y.) 235.

⁴ *Quinn v. Brittain*, 3 Ed. (N. Y.) Ch. 314; *Patton v. Access. Transit Co.*, 4 Abb. (N. Y.) 235.

⁵ *Bayaud v. Fellows*, 28 Barb. (N. Y.) 451.

⁶ *Reubens v. Joel*, 3 Kern. (N. Y.) 488.

pointed, although the mortgagee has the legal title and might enforce his possession at law, whenever there are equitable grounds shown for such relief, such as inadequacy of property to secure the debt, the insolvency of the mortgagor, and danger that the property will be lost or materially injured.¹

Where a corporation engaged in carrying on a newspaper and printing office is greatly embarrassed by its indebtedness, and the officers cannot agree, and their dissensions likely to materially injure the value of the property, a receiver may be appointed, in an action by a mortgagee in a foreclosure proceeding, where it appears that there has been a breach of the conditions of the mortgage.²

§ 1045. **Several Mortgages—Amount of Debt in Dispute.**—When the parties have had mutual dealings and several mortgages have been given, and the amount of the indebtedness is in dispute, sale under power is not allowed; if advertised for sale, the sale may be enjoined until the balance due the mortgagee is ascertained. Chief Justice Pearson says:

“Here we have an unascertained balance due upon a mortgage, to say nothing of a charge of usury; the fact of an action pending for damages by reason of a failure on the part of the defendants to comply with their part of the agreement, and the fact that the power to sell the land is subject to conditions precedent, to wit, that the balance due is not by a sale of the crop, and by a sale of the property contained in a chattel mortgage.

“The proceeds of the sale of the crop is stopped by an order still pending. The sale of the horses, mules, &c., under the chattel mortgage is stopped by an injunction still pending. In despite of these actions now pending the defendants seek to cut the ‘Gordian knot’ by a sale of the land under the power in the mortgage deed. This cannot be allowed.”³

¹ Williams v. Noland, 2 Tenn. Ch. 151.

² State Journal Co. v. Commonwealth Co., 48 Kans. 93. See, also, Hargadine v. Bank, 52 Tex. 362.

³ Purnell v. Vaughan, 77 N. Car. 268.

§ 1046. **Parties to the Suit.**—In a suit to foreclose a mortgage the mortgagor and every party having any interest in the mortgaged property must be made parties defendant, so that the equities can be ascertained.¹

Every person secured by the mortgage should be made a party, though he be not a mortgagee.² Every beneficiary and trustee should be made a party.³

§ 1047. **Mortgagor Without Any Interest.**—A mortgagor without any interest in the mortgaged property, having parted with it by sale or otherwise, and against whom no relief is demanded, is a proper party to a foreclosure suit, but not necessary, and he need not be summoned when no personal judgment is demanded upon the note.⁴

§ 1048. **Payment of Debt in Specific Articles.**—A mortgage to secure the payment of a debt in specific articles, where the mortgagee, on default, is authorized to sell the mortgaged property at public sale, and to retain from the proceeds of the sale a specific sum, may be foreclosed under the statute. Such a mortgage is equivalent to a mortgage to secure the payment of money, and foreclosure of such a mortgage is valid and the mortgagee is entitled to a judgment.⁵

¹ Greither v. Alexander, 15 Iowa 470; Tritipo v. Edwards, 35 Ind. 467.

² Chapman v. Hunt, 14 N. J. Eq. 149.

³ Chapman v. Hunt, 14 N. J. Eq. 149.

⁴ Farnsley v. Anderson, 90 Ind. 120. See, also, Stevens v. Campbell, 21 Ind. 471; Scarry v. Eldridge, 63 Ind. 44.

⁵ Jackson v. Turner, 7 Wend. (N. Y.) 458. See Doolittle v. Lewis, 7 Johns. Ch. 45.

ARTICLE VI.—PLEADINGS, PROOF AND DECREE.

- 1049. Bills of Complaint.
- 1050. Must Aver Notice.
- 1051. Identification of Debt.
- 1052. Evidence—Mortgagors' Refusing to Appear.
- 1053. Conflicting Evidence.
- 1054. Fraud and Duress.
- 1055. Proof.
- 1056. Identification of Property.
- 1057. Defense.
- 1058. When an Assignee Cannot Resist Foreclosure.
- 1059. Attempt to Sell Before Breach—Effect.
- 1060. Decrees.
- 1061. When Personal Representatives Must be Made Parties.
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- 1063. When Personal Decree Should Not be Made.
- 1064. No Personal Indebtedness.
- 1065. Decree for Interest.
- 1066. Under Texas Statute.
- 1067. Decree Binds Parties and Privies in Estate.

§ 1049. **Bills of Complaint.**—Bills of complaint should not contain superfluous verbiage and useless repetition. The mode of statement must be such as to make the pleadings intelligible to the parties and the court, without recurring to possible facts which do not appear, and with such a degree of certainty that nothing can, from the pleading, be presumed to the contrary. The evidence must correspond with the allegations of the bill, and the averments must show that the statute has been complied with in the execution and registration of the chattel mortgage. If the averments comply with the statute, but the evidence shows that the parties did not bring themselves within the statutory provisions, the rights of third parties will not be divested. Thus, a bill in a foreclosure proceeding alleged that the mortgage was executed July 30th, and recorded August 1st. A copy of the mortgage filed with the complaint according to statutory provision, as an exhibit, showed that it was executed July 18th. It was held that the exhibit controlled, and as it was shown that the mortgage was executed July 18th, and the complaint averred that it was not recorded until August 1st, it was void as against *bona fide* purchasers of the mort-

gaged property, under the Statutes of 1881, Section 4913, which requires chattel mortgages to be recorded within ten days of execution.¹

A motion to strike out a bill to foreclose a chattel mortgage cannot be sustained on the ground of want of proper parties if the motion does not point out who should be made parties; nor on the ground that the goods and chattels are not properly described, when many of the goods are particularly described; nor on the ground that the bill includes goods not included in the mortgage, that being a matter of evidence; nor because the bill does not describe all the goods now in the defendant's store, the bill only asking to foreclose the equity of redemption of the goods which are described.²

Where parties having claims against the mortgagor file a cross-bill in a suit to foreclose a chattel mortgage, and in their bill fail to show that their claims have been reduced to judgment, except the claim of one of them, and set up an assignment for the benefit of the mortgagor's creditors, and aver that the mortgage is fraudulent as to creditors, a demurrer to the cross-bill will be sustained as to the parties who have not obtained a lien on the property by action at law.³

§ 1050. **Must Aver Notice.**—A complaint in an action to foreclose a chattel mortgage on cattle, alleged the execution and recording of the mortgage in a certain county; that immediately after executing the mortgage the mortgagor drove the cattle into another county, where he delivered them to the purchaser, who claimed to have purchased them from the mortgagor; that the purchaser knew at the time of such alleged purchase that the cattle had just been driven from another county, and that the price was much less than the value; that the vendor's reputation was very bad; that the defendant or purchaser did not try to learn

¹ *Briggs v. Fleming*, 112 Ind. 313.

² *Howell v. Frances* (N. J.), 9 At. Rep. 379.

³ *Osborne v. Barge*, 30 Fed. Rep. 805.

how his vendor obtained the cattle; that the cattle were in defendant's possession; that the mortgagor was a bankrupt; that the plaintiff had tendered defendant the amount he claimed to have paid for the cattle. It was held that the complaint was demurrable on the ground that it did not show that defendant had any actual or constructive notice of plaintiff's mortgage.¹

§ 1051. **Identification of the Debt.**—In order to enforce a chattel mortgage, either the petition or the evidence must show that the debt sued for is the debt described in the mortgage.

Chief Justice Mitchell, speaking for the court, says: "While literal accuracy in describing the debt secured or the condition upon which the mortgage is to become void is not required, it is essential that the character of the debt and the extent of the incumbrance should be defined with such reasonable accuracy as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of fraud upon creditors.² The court may not assume that debts which in no way correspond with those described are within the terms or security of the mortgage. It would be altogether useless to require that the debts for which the mortgage is to stand as security be described, if other claims bearing no sort of resemblance to those specifically set forth could be regarded as covered by the mortgage without evidence showing their relation to the mortgage."³

Whatever change the debt may undergo, so long as it is shown to be the same debt as that described in the mortgage, the lien or security continues. The form of a debt may be changed, but such a change does not impair the lien of the mortgage.⁴

¹Smith v. Ellis (Wash.), 21 Pac. Rep. 385.

²New v. Sailors, 114 Ind. 407. See, also, Pettibone v. Griswold, 4 Conn. 158.

³Bramhall v. Flood, 41 Conn. 68; Doyle v. White, 26 Me. 341; Storms v. Storms, 3 Bush (Ky.) 77.

⁴Shuey v. Latta, 90 Ind. 136.

§ 1052. **Evidence—Mortgagors' Refusing to Appear.**—In an action to foreclose a mortgage against the mortgagors and one having in possession the mortgaged goods, where the notes secured are given with the mortgage, the declarations of the mortgagor that he had sold to his co-defendant are admitted without objection, and both defendants absent themselves from the trial to avoid testifying, the evidence sufficiently shows that the sale to the co-defendant was after the mortgage was executed.¹

§ 1053. **Conflicting Evidence—Will Not Reverse When.**—A judgment in favor of one seeking to uphold the good faith of a chattel mortgage given to secure a just debt will not, when the evidence is conflicting, be reversed as contrary to the evidence.²

§ 1054. **Fraud and Duress.**—In an action to foreclose a mortgage, an answer which sets up as a defense a failure of consideration, and that the mortgage was obtained by fraud and duress, is sufficient, though the facts constituting the alleged duress are not set out.

In such action evidence of a former transaction had between the parties, which led to the execution of the mortgage, is proper. Chief Justice Simpson said: "The defense was, in substance, in part a failure of consideration on account of misrepresentation as to the age of the ox and fraud and duress in obtaining the mortgage. True, something as to the alleged duress—the facts and circumstances thereof—would have been required in a case before the Court of Common Pleas, perhaps, but in this inferior court was there not enough stated to enable the plaintiff to know what was intended? We think so."³

§ 1055. **Proof.**—Where, in an action for the possession of

¹ Chaytor v. Brunswick, &c., 71 Tex. 588.

² Studebaker Bros. Man. Co. v. Bird, 119 Ind. 427.

³ Riggs v. Wilson, 30 S. Car. 172.

Justices of the peace in South Carolina have jurisdiction to foreclose chattel mortgages which are security for indebtedness not exceeding \$100.

personal property, in Missouri, the mortgagee makes proof of the chattel mortgage to him valid on its face, the possession of the property by the mortgagor, the record of the mortgage, and the maturity of the debt the mortgage was given to secure, he makes out a *prima facie* case, and it is error for the court to direct a verdict for the mortgagor. Judge Black, speaking for the majority of the court, says: "The chattel mortgage is not fraudulent on its face, and there was not sufficient evidence to direct a verdict on the ground of fraud. Proof of the possession of the property by Richey [mortgagor] and the recorded mortgage from him to the plaintiffs, and proof of the maturity of the debt, made a *prima facie* case for the plaintiffs. Mr. Adams, the witness, does not show affirmatively that the execution was levied before the mortgage was recorded. The execution was not read in evidence, nor does the record show when or by whom it was issued. The triors of fact might infer that the execution was levied before the mortgage was recorded, but this did not justify the court in assuming that to be the fact. This court has said where a 'material fact is left in doubt or there were inferences to be drawn from facts proved, the case, under proper instructions, should be submitted to the jury.'"¹

§ 1056. **Identification of Goods.**—The first mortgagee of goods which were removed to another store and there mortgaged again, may prove the removal and identification of the goods without alleging such transactions in his petition to foreclose.² Judge Seevers says: "Now, the question is whether the property described in the mortgage is the same. We think evidence may be introduced showing this fact, in the absence of any allegation in the pleadings. The only question is one of identity. The property is described differently in the mortgages, but it is in fact the same. Clearly, we think, evidence may be introduced so showing, and evi-

¹Turner v. Langdon, 85 Mo. 438. Norton and Sherwood, JJ., dissented.

²Odell v. Gallup, 62 Iowa 253.

dence showing the removal from one building to the other is admissible for this purpose."

§ 1057. **Defense.**—In an action to foreclose a mortgage, and for a judgment on the purchase-money notes secured thereby, averments in the answer that the mortgagee had taken absolute possession of the mortgaged property and converted the same to his own use, and that at the time he so took the same it was of a value largely in excess of the amount due on the notes, state a good defense, as such possession and conversion operate to extinguish the mortgage.¹

The rule is, that in case the mortgagee takes possession of the mortgaged property and converts the same to his own use, it operates as an extinguishment of the mortgage debt, to the extent of the value of the property at the time it was so taken and converted by the mortgagee.²

In a replevin suit by the assignee of a forfeited chattel mortgage against the mortgagor for the goods included in the mortgage, the mortgagor cannot set up in defense that a third party holds a better title than the assignee by reason of a prior mortgage, delivered to such third person by the defendant, as such defense implies a breach of his own warranty of plaintiff's title, especially when it does not appear that the condition of such prior mortgage has been broken.³

§ 1058. **When an Assignee Cannot Resist Foreclosure.**—In general, a voluntary assignee for the benefit of creditors cannot, in the absence of legislation in aid thereof, resist the enforcement of a mortgage of his assignor on the ground that it was made by the latter in fraud of his creditors.⁴

The Florida Supreme Court, per Raney, J., holds with the current of authority, the assignee, under such circum-

¹ *Hartman v. Ringgenberg*, 119 Ind. 72.

² *Landon v. White*, 101 Ind. 249; *Lee v. Fox*, 113 Ind. 98.

³ *Gottschalk v. Klinger*, 33 Mo. App. 410.

⁴ *Bridgford v. Barbour*, 80 Ky. 529; *Williams v. Winsor*, 12 R. I. 9; *Wilson v. Esten*, 14 R. I. 621; *Brownell v. Curtis*, 10 Paige (N. Y.) 210; *Storm v. Davenport*, 1 Sandf. (N. Y.) Ch. 135; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Hawks v. Pritzlaff*, 51 Wis. 160; *Wakeman v. Barrows*, 41 Mich. 363; *Flower v. Cornish*, 25 Minn. 473; *Estabrook v. Messersmith*, 18 Wis. 542.

stances, cannot resist the foreclosure of a chattel mortgage given by his assignor. That the mortgagor could not do it, and that the assignee has no greater power or privilege in the matter than his assignor had, nor could he give him more. "This conclusion is in accordance with the decided weight of authority and entirely in harmony with the previous doctrine of this court on the same and analogous questions. It is a mistake to suggest that the case of *Kent v. Lyon*, 4 Fla. 474, holds that the administrator of a fraudulent grantor, dying in possession of the property, can urge his intestate's fraud as against a recovery by the fraudulent grantee or donee, such administrator coming into possession through his intestate. The contest there was not between the administrator and the fraudulent donee, but between a creditor of the intestate who had levied his execution on the property in the actual possession of the administrator and the donee; and the court held that the deed of gift was void with reference to the creditor, and could be subjected to his execution as assets of the intestate. A careful consideration of the opinion will find that it distinguishes clearly the effect of the bill of sale or transaction, as between the creditor and the donee, from its effect as between the grantor or his administrator and the donee. The cases it cites illustrate the distinction, and it is only when a creditor is a party seeking to subject to his debt the property or to assert his rights as such, that it is regarded as assets in the hands of the administrator, and in his favor alone is it regarded as assets or the question of fraud permitted to be raised. The conclusion reached in *Holliday v. McKinne*, 22 Fla. 153, where the authorities are reviewed, is that the administrator of a fraudulent vendor of personal property, dying in possession, cannot, as against the vendee or donee suing him to recover possession, question the sale as having been made by the intestate in fraud of creditors."¹

¹ *Einstein v. Shouse*, 24 Fla. 490.

Such an assignee will be bound where his assignor will be bound.¹

Statutory provisions may provide that an assignee for the benefit of creditors may file a bill to set aside a conveyance made by his assignor in fraud of creditors.² Many of the authorities make a clear distinction in favor of the statutory assignee or trustee.³

§ 1059. **Attempt to Sell Before Breach—Effect.**—Where one who has taken the legal title of goods to secure himself as surety on the owner's bond, but has never been in possession, attempts to transfer the goods to another before a breach in the condition of the bond, the attempt amounts only to a waiver of his lien and passes no title.⁴

§ 1060. **Decrees.**—Where two causes are consolidated, one to construe a deed for real estate as a mortgage, and the other carrying into effect a chattel mortgage, the decree of foreclosure should be limited, and a sale of the personal property to the sum for which such chattel mortgage was given.⁵

§ 1061. **When Personal Representatives Must be Made Parties.**—In a suit to redeem, all persons interested must be made parties, and the personal representatives of an intestate who had an interest at his death. Thus, a party mortgaged certain shares of stock, which, although personalty, were by the charter of the corporation transferable by deed, and then by deed assigned his property for the benefit of his creditors. The assignee conveyed the property to a purchaser, setting forth the same trusts as those under which he had received the assignment. The purchaser died. It was held on a bill to redeem, brought by the administrator of the assignor, that the legal title to the shares of stock passed

¹ Morris' Appeal, 88 Pa. St. 368; Wakeman v. Barrows, 41 Mich. 363.

² Pillsbury v. Kington, 33 N. J. Eq. 287.

³ Einstein v. Shouse, 24 Fla. 490.

⁴ Comley v. Dazian, 114 N. Y. 161.

⁵ Danielson v. Gude, 11 Colo. 87.

to the purchaser, and that the personal representatives of him were necessary parties to the suit.¹

§ 1062. **When Entitled to a Personal Decree.**—In order to obtain a personal decree against the mortgagor it must be prayed for in the bill of complaint. If the mortgagee fails to establish his right against the property, his remedy is by suit at law upon the mortgage debt.² A subsequent purchaser of the mortgaged property cannot set up a demand in favor of the mortgagor against the mortgagee as a counter-claim.³

§ 1063. **When Personal Decree Should Not be Made.**—In foreclosing a chattel mortgage a personal decree should not be made against one who constructively only has converted the mortgaged property by receiving it from the mortgagor; the remedy against the specific property being ample, and having been in no way impaired by the party guilty of such constructive conversion.⁴

§ 1064. **No Personal Indebtedness.**—In an action to foreclose a mortgage on personal property which is in possession of defendant, who holds a senior mortgage on the property, and who is not personally indebted to the plaintiff or junior mortgagee, it is error to give a personal judgment against the defendant. The court held that while there was no doubt that plaintiff had the right to claim a foreclosure, inasmuch as said property was found by the referee as of sufficient value to pay both mortgages—that is, the older mortgage of defendant and the mortgage of the plaintiff—yet it could not see the foundation of a personal claim in favor of plaintiff against defendant. “As far as we can see, the defendant was not personally indebted to plaintiff, either by contract or in any other way;” hence, no personal judgment should be entered against him.⁵

¹ Clark v. Robinson, 15 R. I. 226, opinion by Stiness, J.

² Wylder v. Crane, 53 Ill. 490.

³ Beers v. Waterbury, 8 Bosw. (N. Y.) 396.

⁴ Sears v. Abrams, 10 Oreg. 499.

⁵ Edwards v. Dargan, 30 S. Car. 177.

§ 1065. **Decree for Interest.**—When a mortgage provides for interest on the debt secured, it is proper to provide for interest in the decree distributing the proceeds of the property, which has been sold, by a litigation between different mortgagees.¹

In Alabama, in a suit to foreclose a mortgage on crops covered by it in possession of a party who was in possession by consent of the mortgagor, the court properly takes cognizance of a claim by the mortgagee against such party on account of crops covered by the mortgage, received and disposed of by said party before the suit was commenced.

Where the property previously disposed of by the said party was not included in a forthcoming bond given by him, the mortgagee should be allowed interest on its value from the time of its sale by the party thus in possession.²

§ 1066. **Under Texas Statute.**—Article 1340 provides that the judgment on foreclosure of a mortgage shall be for the debt, &c. On foreclosing a lien on the property subject thereto, an order was issued to the sheriff to seize and sell. If the property was insufficient to satisfy the judgment, then to make the balance out of the other property of defendant, as in cases of ordinary execution; it was held that where property is claimed by a purchaser under execution against a mortgagor, it is error to order such purchaser to deliver the property to the sheriff within a certain time, and who has failed so to do, that plaintiff recover of him the value.³

§ 1067. **Decree Binds Parties and Privies in Estate.**—A decree for the foreclosure of a chattel mortgage, where the court has jurisdiction of the parties and of the subject-matter, and orders sale of the mortgaged property, from which no appeal is taken, is binding and conclusive upon the mortgagor and all persons claiming title through or under him, after the filing of the bill to foreclose the mortgage.⁴

¹Stickney v. Stickney, 77 Iowa 699.

²Comer v. Lehman, 87 Ala. 362, opinion per McClellan, J.

³Frankel v. Byers, 71 Tex. 308.

⁴McCauley v. Rogers, 104 Ill. 578.

CHAPTER XX.

STATUTORY FORECLOSURE AND REDEMPTION.

ARTICLE I.—STATUTORY PROVISIONS.

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§ 1068. **In General.**—In most of the States statutory provisions exist whereby the mortgagee may, on forfeiture of the terms of the mortgage by the mortgagor, take possession of the mortgaged property and sell the same without resort to court. But these statutory provisions do not prevent the mortgagee from bringing foreclosure proceedings in court,

and have the matter judicially settled by decree of court by sale and payment.

When the mortgagee forecloses under the statute he must follow the law in every particular. If he may disregard the provisions of the statute in one essential requirement and not be liable to the mortgagor for the abuse of power, he could disregard all other provisions, and suit his own convenience and pleasure in the disposition of the property. While the statute protects the rights of the mortgagee and enables him to sell the property under ordinary conditions, and thus divest all interest of the mortgagor, it also protects the rights of the mortgagor and requires the mortgagee to conduct the sale in the manner prescribed. The rule is well settled, that if a mortgagee in possession of the mortgaged goods, sell them before he has complied with all the requirements of the statute, he will be liable to the mortgagor for any damage he may sustain.¹

§ 1068a. **Alabama.**—Personal mortgages may be foreclosed in equity, and the decree of the Chancery Court has the force and effect of judgments; an execution thereon may be issued against the goods, chattels, lands and tenements of the parties against whom such decree may be rendered. But no execution can be issued, or the enforcement of the equitable lien until the property ordered sold shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of such Court of Chancery; then execution may issue for the balance which may be found due.

In this State chattel mortgages may be foreclosed as follows: 1. By selling the property under a power of sale contained in the mortgage. 2. By an action of detinue to recover possession. 3. By bill in equity for foreclosure. In this State the rights of the mortgagee cannot be affected by the mort-

¹ *Simpson v. Carleton*, 1 Allen (Mass.) 109; *Denny v. Faulkner*, 22 Kans. 89; *Black v. Howell*, 56 Iowa 630; *Stromberg v. Lindberg*, 25 Minn. 513; *Brink v. Freoff*, 40 Mich. 610; *French v. Edwards*, 13 Wall. (U. S.) 506; *Loeb v. Milner*, 21 Nebr. 392.

gagor remaining in possession after forfeiture, except by some act or consent of the mortgagee. All the original rights of the mortgagee are preserved.¹

§ 1069. **Arizona.**—In foreclosing a mortgage on chattels, the court by its decree can direct a sale of the property, or any part of it, and order the application of the proceeds to the debt, lien or incumbrance, with costs and execution for any balance. Any surplus will be paid to the person entitled to it. So soon as sufficient property has been sold to discharge the debt, lien or incumbrance, the sale shall cease; and in case other amounts shall fall due and be unpaid, the court, on motion, may order more to be sold to liquidate that indebtedness. But if the property cannot thus be sold at different times without injury to the interests of the parties, the court may order the whole to be sold at first, and the entire debt discharged, with proper rebate of interest.

The mortgagor has a right of redemption until foreclosure by law, or by agreement between the parties to the mortgage, which agreement shall be entered on the record of the mortgage.²

§ 1070. **Arkansas.**—Mortgages may be foreclosed in a court of equity or by sale, if so provided in the deed. If by sale, the property must be appraised by three disinterested parties, to be appointed by the nearest justice of the peace, and must bring two-thirds of the appraised value. If no one offers two-thirds of the appraised value, the property is offered again at the end of sixty days, and can be sold for what it will bring; but this does not apply to mortgages for purchase-money. Mortgages are barred when the debt is. In case of mortgages to secure borrowed money the mortgagor may, in the mortgage, waive the right of appraisal and redemption.³

§ 1071. **California.**—Personal mortgages are foreclosed

¹ Code, § 3908.

² Com. Laws, §§ 2484, 2485, 2486.

³ Mansfield Dig. ch. 110.

under the Code, which provides that the court may, by judgment, order a sale of the mortgaged property, or so much thereof as may be necessary, and the proceeds to be applied to the debt and costs. If the proceeds are insufficient, a judgment may be rendered against the mortgagor for the balance due, which becomes a lien on the real estate of such judgment debtor, as in other cases in which executions may issue. If a surplus remains, the court will order it paid to the debtor. When the debt is not all due, so soon as enough has been sold to satisfy what is due, with the costs, the sale must cease. Upon subsequent amounts becoming due, on motion the court will order more of the mortgaged property sold. If the property cannot thus be sold, then the whole amount will be sold and the entire debt and costs will be paid, with proper rebate and interest.¹

The Code Civil, Section 726, provides that "there can be but one action for the recovery of any debt * * * secured by mortgage upon real estate or personal property," and that it shall be foreclosed; this is imperative, and a creditor holding a mortgage given as security must bring his action of foreclosure, and, though the security proves valueless, he cannot waive it and bring an action on the debt.

Judge Thornton says that the word "secured" in the statute does not mean that the security shall be adequate or that, in case prior liens upon it would exhaust the money derived from the land conveyed as security on a sale of it, that then the mortgagee is relieved from bringing an action to foreclose.

The proper construction of the language of the statute is, that if the mortgage on its face purports to be a security to the mortgagee, then he must bring his action for foreclosure. The mortgagee is not authorized to waive the security and bring an action on the indebtedness.²

¹ Code Civil Pro. §§ 726-728.

² *Barbieri v. Ramelli*, 84 Cal. 154.

The Civil Code¹ provides that the sale by the pledgee of property must be by public auction, "upon the notice to the public, usual at the place of sale, in respect to auction sales of similar property, and must be for the highest obtainable price." Chattel mortgages may be foreclosed by sale of the property, made in the manner and upon the notices prescribed for the foreclosure of pledges. The mortgagee may, after demanding payment from the mortgagor of the amount due, and giving him actual notice of the time and place of sale for such reasonable time as will enable him to attend, sell the mortgaged property at public auction to the highest bidder.

Though a chattel mortgage waives demand for payment and notice to mortgagor of time and place of sale, and that mortgagee may become the purchaser, a sale under it is void as against a junior mortgagee, where the mortgagee purchases the property for \$1,000, when it is worth \$5,000, on notice of the sale for only two days when the usual notice was not less than five days.²

§ 1072. **Colorado.**—In actions for foreclosure the court has power to order a sale of the mortgaged chattels or as much as may be necessary, applying the proceeds to the debt and costs. If the sheriff's returns show a deficiency, a judgment shall be rendered against the mortgagor, which shall become a lien on the real estate of such judgment debtor as in other cases in which executions may issue. If there be a surplus remaining, the court may order it paid to the mortgagor or person entitled to it.

If the debt does not become due all at one time, so soon as sufficient property has been sold the sale shall cease. If other payments fall due and be unpaid, on motion the court will have more sold. If the property cannot be sold without injury to the interested parties, the whole may be sold at first, the debt and expenses paid, with a proper rebate for interest.³

¹ Code Civil Pro. §§ 3000-3011.

² *Bendel v. Crystal Ice Co*, 82 Cal. 199.

³ Gen. Stat. of 1877, §§ 229-231.

When the mortgagee takes possession of the property after default, his possession must be open, notorious and unequivocal, otherwise he will not be protected. Thus, a mortgagee of horses left in the mortgagor's livery stable after default, went to the stable and "checked off" the horses mortgaged, without separating them from other horses in the stable or putting up any notice of ownership. He left an agent in charge of them, with instructions not to allow them to be taken from the stable. The mortgagor still fed and cared for them, and testified that he used them in his business until attached by a third party. The court held that there was not a sufficient change of possession within the meaning of the statute, Section 1523, providing that every sale of chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusively presumed to be fraudulent and void as against creditors of the mortgagor, though Section 165 provides that when the mortgage is recorded the mortgagor may remain in possession for two years.¹

§ 1073. *Connecticut*.—The mortgage may be foreclosed in equity, the court ordering the property mortgaged, or so much thereof as may be necessary to discharge the debt and costs, sold, unless such debt and costs shall be paid within a time named by the court. If any surplus remains it shall be paid to the party entitled to it.

No chattel mortgage shall be considered invalid as to any item of personal property included therein, by reason of its being described as consisting of less than its true number or quantity; but if foreclosed, the court may make a just order

¹ *Atchison v. Graham*, 23 Pac. Rep. 876. The law of Colorado in regard to the time of taking possession was, until amended, that upon default, whether the entire debt had matured or not, the mortgagee must take possession of the property to protect himself against creditors of the mortgagor. *Atchison v. Graham*, 23 Pac. Rep. 876.

The amended law provides that the mortgage shall be good and valid from the time it is so recorded until the maturity of the last installment of the mortgage indebtedness, but not exceeding two years, if the principal of said mortgage indebtedness be not exceeding \$2,500. *Laws of 1887*, p. 75.

of division in the final decree. When personal property is mortgaged, together with the real estate upon which it is situated, the mortgage may be foreclosed as if wholly of real estate.¹

§ 1074. **Instance.**—The statute² providing that “foreclosure of a mortgage shall be a bar to any further action upon the mortgage debt, note or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure,” applies to a mortgage of personal property as well as of realty, and to foreclosure by judicial sales as well as to strict foreclosure. A foreclosure is that proceeding which cuts off the mortgagor’s equity of redemption in the property mortgaged, “and obviously is not affected by the kind of property which is the subject of the mortgage. It does not mean one thing when the property mortgaged is real estate, and another thing when the property mortgaged is personalty.”³

§ 1076. **Delaware.**—If default is made, and sixty days have expired since the debt was due, the mortgagee may proceed to enforce the payment of his claim by the same process as is used in the case of real-estate mortgages, and judgment may be rendered as well for default of appearance or want of affidavit of defense as upon trial. The proceeds of the sale shall be paid in the satisfaction of liens in the order of their priority, and any surplus shall be paid to the party entitled to it.⁴

§ 1077. **Florida.**—The mortgagee may foreclose by filing his petition in the Circuit Court of the county where the mortgaged property is located. The petition and mortgage must be filed in the office of the clerk of the court at least two months before the term of the court at which the judgment of foreclosure shall be rendered. The party must make an affidavit of the amount of the principal and interest

¹ Gen. Stat. p. 359, §§ 7, 8.

² Gen. Stat. § 3016.

³ Ansonia Nat. Bank’s Appeal, 58 Conn. 257.

⁴ Laws, vol. 15, ch. 477, § 2.

due, and the court will then give judgment for the petitioner for the amount of the debt due and interest, together with costs. Such judgment will foreclose and debar the mortgagor and all persons claiming under him from all right of redemption.¹

When the mortgage does not exceed \$100, suit to foreclose is commenced in a justice's court and lien is enforced by execution.²

§ 1078. **Georgia.**—Chattel mortgages are foreclosed in equity or upon affidavit made by the holder of the mortgage, or his agent or attorney in fact or in law, before any officer of the State authorized to administer oaths, such as notaries public, justices of the peace, judges of superior courts, &c., or before a commissioner of the State in another State; said affidavit stating the amount of principal and interest due; that the mortgagor resides in the county where foreclosed, if residing in the State, or, if not then a resident of the State, where he resided at the date of the mortgage. When the mortgage with such affidavit annexed thereto shall be filed in the office of the clerk of the Superior Court of the county where the mortgagor resides, or where he resided at the date of the mortgage, if not a resident of the State, such clerk shall issue execution for sale of the mortgaged property after levy and advertisement once a week for four weeks. When the debt is not over \$100, the mortgage, with affidavit annexed, as aforesaid, may be filed with and execution issued by a justice of the peace of the county where the property is found, which justice shall give notice to the mortgagor of the proceeding, and the constable may sell after advertising sale at three or more public places in his district.³

§ 1079. **Instances.**—Where the affidavit to foreclose was held bad because the jurat was unsigned, and the *feri facias* for that reason was quashed, a motion to reinstate on the

¹ Bush. Dig. ch. 122, §§ 3, 4.

² Act of 1885.

³ Code, §§ 3971-3979a; *Manheim v. Claffin*, 81 Ga. 129.

ground that the affidavit was in fact sworn to, and the magistrate omitted to subscribe the jurat by mistake, will not prevail; no error in granting a motion to quash being alleged in the motion to reinstate, and it appears that no showing as to these facts, nor any effort to amend the jurat was made when or before the order to quash was passed.¹

§ 1080. **Mesne Process.**—Where a mortgage has been foreclosed and levied, and a counter-affidavit has been filed and returned for trial, the execution is mesne, not final process.²

Where a mortgage had been foreclosed by affidavit, and a counter-affidavit had been interposed and returned for trial, the execution levied on the property was in the nature of mesne process, and as such amendable.³

§ 1081. **Insufficient Description.**—A description in an execution for foreclosure of a mortgage given on certain lumber, rosin and cotton shipped on board a vessel known as the *Juanita Clar*, directed that the lumber, rosin and bales of cotton now on board the *Juanita Clar*, lying in said county, &c., it was held insufficient in not showing whose property was to be levied on.⁴

§ 1082. **Venue.**—An affidavit to foreclose a chattel mortgage must allege that the mortgagor resides in the county of such proceedings.⁵

A mortgage executed by a non-resident at the time may, if the property be brought into this State, be foreclosed in the county where the property may be found, under Section 3895 of the Code.⁶

A chattel mortgage must be foreclosed in the county in which the mortgagor resided at the time of the execution of the mortgage, if a resident of the State.⁷

¹ *Davidson v. Rogers*, 80 Ga. 237.

² *Hart v. Hatcher*, 71 Ga. 717.

³ *Dawson v. Garland*, 70 Ga. 447.

⁴ *Morton v. Gahona*, 70 Ga. 569.

⁵ *Callaway v. Walls*, 54 Ga. 167.

⁶ *Griffin v. Marshall*, 45 Ga. 549.

⁷ *Brown v. Greer*, 18 Ga. 285.

§ 1083. **Lost Mortgage.**—Where an original mortgage of personal property has been lost or destroyed, the mortgage may be foreclosed on a certified copy from the record of the mortgage.¹

§ 1084. **Defense.**—Against the proceedings to foreclose, the mortgagor may, at law, go into the consideration of the mortgage, or rely, by way of defense, upon any facts or principle of law which would entitle him to relief in a court of equity.²

When the affidavit to foreclose a mortgage upon personalty does not show jurisdiction to issue the execution in the magistrate who issued it, and when the execution shows upon its face that he had no jurisdiction, the same stating that the mortgagor was of another county, the execution is void. The affidavit was not amendable, the same having been made not after, but before the passage of the act of 1887, providing for the amendment of such affidavits thereafter made.³

§ 1085. **Idaho.**—In foreclosing a chattel mortgage the court may, by its judgment, order a sale of the mortgaged property, or so much thereof as may be necessary, and the proceeds be applied to the discharge of the debt and costs. If it appears from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment may be rendered against the defendant for such debt, and it becomes a lien on the real estate of the judgment debtor, as in other cases in which execution may issue. A surplus will be paid to the person entitled to it. If the debt is not paid all at one time, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease, and afterwards, as often as more becomes due for principal and interest, on motion the court may order more to be sold. But if the property cannot be sold in portions without injury to the interested parties, the whole may be sold at

¹ *Holt v. Holt*, 23 Ga. 5.

² *Mell v. Moony*, 30 Ga. 413.

³ *Hamilton v. Kerr* (Ga.), 10 S. E. Rep. 502.

first and the entire debt and costs paid, there being made any proper rebate for interest.¹

A right of redemption remains in the mortgagor until the same shall have been foreclosed by due process of law or by agreement between the parties to the mortgage, which agreement shall be entered on the record of the mortgage.²

The common practice is, however, for the mortgagee to make an affidavit showing the date of his mortgage, the amount due and describing the property. This the sheriff takes, serves it on the mortgagor, then takes possession of the mortgaged property and sells, after posting three notices of sale and serving a notice of sale on the mortgagor five days prior to the time of selling.³

§ 1086. **Illinois.**—It shall be lawful for the mortgagor of personal property to insert in his mortgage a clause authorizing the sheriff of the county in which the property, or some part thereof, is situated, to execute the power of sale therein granted to the mortgagee or his assignee or legal representative, in which case the sheriff, at the time of such sale, of such county, may advertise and sell the mortgaged premises pursuant to such power, and may execute all proper conveyances of the property so sold in the name of and as the attorney in fact of the mortgagor; and at any sale as aforesaid the mortgagee, his assigns or legal representatives, may fairly and in good faith purchase the property or any part thereof.⁴

A Court of Chancery may order mortgaged property, real and personal, sold together.⁵

§ 1087. **May Foreclose in Equity.**—A court of equity has jurisdiction of a bill to foreclose a chattel mortgage.⁶

When there are successive liens and incumbrances upon mortgaged property considerable in amount, a bill in equity

¹ Rév. Laws, p. 144, §§ 267-269.

² Rev. Laws, pp. 662, 663, §§ 4-6.

³ Rev. Stat. §§ 3885-3898.

⁴ Rev. Stat. ch. 95, § 11.

⁵ Wood v. Whelen, 98 Ill. 153.

⁶ McCauley v. Rogers, 104 Ill. 578; Gaar v. Hurd, 92 Ill. 315.

may be maintained to foreclose a chattel mortgage thereon, to adjust the rights and have the property sold and the fund distributed; but if the amount is small and there are no adverse claims of other creditors, or liens, it seems that such bill cannot be sustained, as in such case the remedy by notice and sale of the property is sufficient.¹ But in case there are adverse claims, successive mortgages and incumbrances, a court of equity will take jurisdiction of the suit and adjust the rights of all interested parties.²

§ 1088. **Foreclosure Under Power of Sale.**—Generally the mortgage contains provisions for summary foreclosure, by public or private sale, on a few days' notice, without court proceedings. But a mortgage on household goods, wearing apparel or mechanics' tools, must be foreclosed in a court of record; and, before foreclosure, such property can be taken from the mortgagor's possession by the sheriff only on a judge's order.³

Under the Statute of 1845, Ch. 20, Sec. 3, the mortgagee could not permit the mortgaged property to remain with the mortgagor until maturity of debt, provided default arose under the mortgage in less time.⁴ The Statutes of 1874, Ch. 95, Sec. 4, make chattel mortgages valid from the time they are filed for record until maturity of the entire debt or obligation, not to exceed two years.

§ 1089. **Mortgages on Household Goods, Wearing Apparel and Mechanics' Tools.**—Foreclosure of mortgages on necessary household goods, wearing apparel and mechanics' tools, executed after June 30th, 1889, can be foreclosed only in a court of record; this does not apply to furniture sold by regular dealers on the installment plan. No one but a sheriff can take possession of this kind of property, and he only after obtaining an order of court.⁵

¹ Dupuy v. Gibson, 36 Ill. 197.

² Hammers v. Dole, 61 Ill. 307.

³ Laws of 1889, tit. "Mortgages."

⁴ Reed v. Eames, 19 Ill. 594.

⁵ Laws of 1889, tit. "Chattel Mortgages."

§ 1090. **Indiana.**—Upon condition broken, mortgagee may maintain replevin for possession, but the mortgagor, his heirs, assigns, legal representatives and execution creditors, have the equity of redemption, which can be extinguished only by a judicial sale, under foreclosure proceedings or a sale according to express terms of the mortgage. It may be foreclosed as a mortgage of real property is. Taking possession and retaining it without foreclosure and sale under decree, will constitute payment of the mortgaged debt.¹

§ 1091. **May Foreclose in Court.**—Whether the mortgage contains a power of sale or not, the mortgagor's equity of redemption may be foreclosed by a judicial proceeding, or by taking possession of the mortgaged property and sale at public auction, in pursuance of legal notice to the mortgagor.²

§ 1092. **Iowa.**—A mortgage of personal property to secure the payment of money only, and when the time of payment is therein fixed, may be foreclosed by notice and sale, unless a stipulation to the contrary has been agreed upon by the parties, or may be foreclosed by action in the proper court. The notice must contain a full description of the property mortgaged, together with the time, place and terms of sale.

The notice must be served on the mortgagor and all subsequent purchasers, and on all persons having recorded liens upon the same property which are junior to the mortgage, or they will not be bound by the proceedings. The service and return must be made in the same manner as in the case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for the purpose. After notice has been served upon the parties, it must be published in the same manner, and for the same

¹ *Landon v. White*, 101 Ind. 249.

² *Lee v. Fox*, 113 Ind. 98.

No formal foreclosure is required. The equity of redemption can be extinguished only by a public sale after proper notice, or by a judicial sale on foreclosure proceedings.

length of time as required in case of the sale of like property on execution, and the sale shall be conducted in the same manner.

The purchaser shall take all title and interest on which the mortgage operated. The sheriff conducting the sale shall execute to the purchaser a bill of sale of the personal property, which shall be effectual to carry the whole title and interest purchased.¹

§ 1093. **Instances.**—A mortgage may be foreclosed after the death of the mortgagor, and the mortgagee need not file his claim against the estate.²

§ 1094. **May be Foreclosed in Equity.**—Though a mortgagee need not resort to a court of equity, yet the foreclosure of a chattel mortgage is subject to equity jurisdiction.³

There is no specified time in which a chattel mortgage must be foreclosed.⁴

§ 1095. **Kansas.**—The mortgagee or his assignee may proceed to sell the mortgaged property after condition broken, or so much thereof as may be necessary to satisfy the mortgage and cost of handbills posted up in at least four public places in the township or city in which the property is to be sold, at least ten days previous to sale. If the mortgagee or his assignee shall have obtained possession of the mortgaged property, either before or after condition broken, the mortgagor or any subsequent mortgagee may demand, in writing, a sale of such property. Then the property must be sold as set forth in the statute. Any surplus then remaining, the same shall be paid to any subsequent mortgagee entitled thereto, or to the mortgagor or his assigns.⁵

§ 1096. **Kentucky.**—In an action to foreclose a chattel mortgage the court may order the sale of the property and give judgment against the mortgagor personally. Such sale

¹ Rev. Code, §§ 3307–3317. Mortgages of after-acquired property are valid.

² *Cocke v. Montgomery*, 75 Iowa 259.

³ *Packard v. Kingman*, 11 Iowa 219; *Kramer v. Rebman*, 9 Iowa 114.

⁴ Rev. Laws, tit. XX. ch. 4.

⁵ *Dass. Com. Laws of 1885*, §§ 3499–3509.

must be public, upon reasonable credits to be fixed by the court, not less than three months. Unless otherwise ordered, the sale shall be made at the door of the court-house of the county in which the property, or greater part of it, is situated; and the notice of sale must state for what sum of money it is to be made. The purchaser shall, under the order of the court, give a good and sufficient bond; or if the court make no order on the subject, it shall be made payable to the officer. It shall bear interest from date at the rate the judgment bears. It shall have the force of a judgment; and on execution issued upon it no replevy shall be allowed, and sales shall be for cash.¹

§ 1097. **Maine.**—When the condition of a mortgage of personal property is broken, the mortgagor or any person legally claiming under him may redeem it at any time, before it is sold, by virtue of a contract between the parties on an execution against the mortgagor, or before the right of redemption is foreclosed, by paying or tendering to the mortgagee or his assignee the sum due thereon, or by performing or offering the conditions thereof, when not for the payment of money, with all reasonable charges incurred. If the property is then not immediately restored it may be replevied, or damages for withholding it recovered in an action on the case.

The mortgagee or his assigns may give to the mortgagor or his assigns, when his assignment is recorded where the mortgage is recorded, written notice of his intention to foreclose the same, by leaving a copy thereof with the mortgagor or his assigns, or if the mortgagor is out of the State, though resident therein, by leaving such copy at his last and usual place of abode, or by publishing it once a week, for three successive weeks, in one of the principal newspapers published in the town where the mortgage is recorded.

The notice, with an affidavit of service or a copy of the publication, with the name and date of the paper in which

¹ Civil Code, §§ 695-698.

it was last published, shall be recorded where the mortgage is recorded, and the copy of such record shall be evidence that the notice has been given.

If the mortgagee or his assignee is not a resident of the State he shall, at the time of recording such notice, record therewith his appointment of an agent resident in the same town to receive satisfaction of the mortgage, and payment or tender may be made to him. If he does not appoint such agent, the right to redeem shall not be forfeited. The right to redeem shall be forfeited, except as provided in the preceding sections, if the money to be paid, or other thing to be done, is not paid or performed, or tender thereof made, within sixty days after such notice is recorded.¹

§ 1098. **Notes Are Given.**—Notes are also given for property, stipulating that it shall remain the property of the payee until the note is paid, and are subject to the same regulations as to record and foreclosure as mortgages.²

§ 1099. **Maryland.**—A clause may be inserted in a chattel mortgage authorizing the mortgagee, or any other person to be named therein, to sell the mortgaged property upon such terms and on such contingencies as may be expressed therein.

When the interests in any mortgage are under one or more assignments, or otherwise, the power of sale contained shall be held divisible, and he or they holding any such interest who shall first institute proceedings to execute such power shall thereby acquire the exclusive right to sell the mortgaged premises. But before sale the party so authorized shall give bond to the State in such penalty and with such security as shall be approved by the judge or clerk of a court of equity of the city or county in which the chattels may be, to abide by and fulfill any order or decree which shall be made by any court of equity in relation to the sale of such mortgaged property. Sales made in pursuance of such authority shall have notice given as stated in the mort-

¹ Laws of 1880, ch. 193; ch. 91, §§ 1-7.

² Chapter 111, § 5.

gage. In absence of an agreement, then twenty days' notice shall be given by advertising in some newspaper printed in the county where the mortgaged property may be, if there be one so published, and if not, in a newspaper having a large circulation in said county, and also by advertisement set up at the court-house door of said county. These sales must be reported under oath to the court having chancery jurisdiction where the sale is made, and there shall be the same proceedings on such report as if the same were made by a trustee under a decree of said court, and the court shall have full power to hear and determine any objections which may be filed against such sale, and may confirm or set aside the sale thus made. When confirmed by the court such sale shall pass to the purchaser all the title the mortgagor had at the time of recording the mortgage. The surplus, if any, may be distributed equitably among the claimants.

When any suit is instituted to foreclose a mortgage the court may decree, except in Baltimore,¹ that, unless the debt and costs be paid by a certain time, the property may be sold for cash, unless the complainant shall consent to a sale on credit. If the proceeds do not satisfy the debt and costs the court may, on motion of the complainant, enter a decree *in personam* against the mortgagor or other party to the suit who is liable for the payment thereof, provided the mortgagee would be entitled to maintain an action at law upon the covenants contained in said mortgage for said residue of the said mortgage debt, which decree shall have the same effect as a judgment at law, and may be enforced only in like manner by a writ of execution in the nature of a writ of *fiery facias* or otherwise.²

§ 1100. **Massachusetts.**—Upon default, the mortgagor, or any person legally claiming under him, may redeem the mortgaged property at any time before the property is sold in pursuance of the agreement between the parties, or the right of redemption is foreclosed. The person entitled to

¹ Pub. Local L., art. 4; *Bernstein v. Hobleman*, 70 Md. 29.

² Rev. Code, art. 66, §§ 47-53, 65.

redeem shall pay or tender to the mortgagee, or to the person holding under him, the sum due on the mortgage, or shall perform or offer to perform the thing to be done, and shall pay all reasonable and lawful charges incurred in the care and custody of the property. If then the property is not forthwith restored, it may be recovered in an action of replevin, or the person entitled to redeem may recover such damages as he may have sustained by the withholding thereof, in an action adapted to the circumstances of the case. Or the mortgagee or his assigns, after condition broken, may give to the mortgagor, or to the person in possession of the property claiming the same, written notice of his intention to foreclose the mortgage for breach of the condition thereof, which notice shall be served by leaving a copy with the mortgagor, or person in possession of the property claiming the same; or by publishing it at least once a week, for three successive weeks, in one of the principal newspapers published in the town or city where the mortgage is properly recorded, or where the property is situated; or, if there is no such paper, in one of the principal newspapers published in such county.

The notice, with an affidavit of the service, shall be recorded wherever the mortgage is recorded, and, when so recorded, the same, or a copy of the record, shall be admitted as evidence of the giving of such notice.

If the money to be paid, or other thing to be done, is not paid or performed, or tender thereof made, within sixty days after such notice is so recorded, the right to redeem shall be foreclosed.¹

§ 1101. **Instances.**—When a chattel mortgage of personal property is valid without being recorded, the notice of intention to foreclose it is valid without registration.²

§ 1102. **May Go Into Equity.**—If a mortgagee of personal property refuses to render an account, without which the

¹ Gen. Stat. ch. 192, §§ 4-8.

² *Taber v. Hamlin*, 97 Mass. 489.

mortgagor cannot ascertain the amount due so as to make payment or tender for the redemption of the property, relief will be afforded to the mortgagor in equity.¹

§ 1103. **Michigan.**—A mortgagee may foreclose by proceeding to sell the property after due notice, or to sell in accordance with a power of sale contained in the mortgage;² or the mortgagee may foreclose in a Court of Chancery. Any surplus remaining is held by the mortgagee in trust for the mortgagor. At any sale of property upon foreclosure of a chattel mortgage, the mortgagee or his assigns, or his representatives, may fairly and in good faith purchase the property so offered for sale.

§ 1104. **Minnesota.**—After condition broken, the mortgagor, or any person lawfully claiming under him, may redeem the same at any time before the property is sold, in pursuance of an agreement between the parties, or the right of redemption is foreclosed. The person entitled to redeem shall pay or tender to the mortgagee or assigns, the sum due on the mortgage, or offer performance of the thing to be done, and shall pay all reasonable and lawful charges and expenses incurred in the care and custody of the property; if then the property is not forthwith restored, the person entitled to redeem may recover it in civil action, with such damages as he may have sustained by the withholding thereof.

If the mortgagee has a remedy by sale of the mortgaged property, authorized by the terms of the mortgage in case of default, such property cannot be sold at private sale but only upon previous written notice, given at least ten days before sale, by serving a copy of such notice upon the mortgagor, or upon the person in possession of the property, claiming the same, if to be found within the town, city or village where the mortgage is filed; if not so found, then by posting a copy of such notice in three of the most public places of the city, village or town where the mortgage is filed, or where the

¹ Boston, &c., v. Montague, 108 Mass. 248.

² How. Stat. ch. 234, § 6193 *et seq.*; Flanders v. Chamberlain, 24 Mich. 305.

property is seized or taken under the mortgage. Such sale must be made by the sheriff of the county or constable of the town. Redemption can be made at any time prior to the sale. Equity of redemption can be foreclosed by service of a sixty days' notice of intention to foreclose same, on the person in possession, or by publication for three successive weeks.¹

§ 1105. **The Mortgagee May Purchase at the Sale—Expenses.**—The mortgagee, his legal representative or assign, may purchase at the sale.²

In view of the statute, and of the terms of a chattel mortgage authorizing the mortgagee to retain from the proceeds of the mortgaged property a specified attorney's fee, and such other expenses as may be incurred, the mortgagee may charge the reasonable and necessary expenses of proper efforts, although unsuccessful, to take possession of the mortgaged property, and the mortgage may be enforced to satisfy such sum, notwithstanding a tender of the bare debt. The attorney's fees are not chargeable, if there be no foreclosure. Judge Dickinson says the taking of the property is a proper step in the proceedings for the enforcement of the mortgage, and the proper expense of it is authorized, both by the statute and by the mortgage, to be charged as a sum to be satisfied under the mortgage; that the expenses chargeable are not limited to such only as are incurred in such efforts to take the property as are immediately successful; and if proper efforts to gain possession wholly fail, without fault of the mortgagee, the expense is chargeable, so that the mortgagor cannot thereafter satisfy the obligation for which the mortgage is held, by tendering payment of the bare debt, without such expenses.³

A stipulation in a mortgage for the payment of the "expenses for the sale and keep of said property," is sub-

¹ Gen. Laws of 1885, ch. 171.

² Laws of 1885, p. 212.

³ *Reisan v. Mott*, 42 Minn. 49.

stantially equivalent to the statutory provision, and includes the expense of taking the property.¹

§ 1106. **Mississippi.**—When any mortgage or deed of trust shall be given on any real or personal estate, or when any lien shall be given by law to secure the payment of any sum of money specified in any writing, no action or suit or other proceeding shall be brought or had upon such lien, mortgage or deed of trust, to recover the sum of money so secured, but within the time that may be allowed for the commencement of an action at law, upon the writing in which the sum of money secured by such mortgage or deed of trust may be specified; and in all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

Mortgages are foreclosed in courts of equity.²

§ 1107. **Missouri.**—Chattel mortgages are generally given with a power of sale in the mortgagee. Sales made by mortgagee when so empowered shall be valid and binding upon the mortgagor and all persons claiming under him, and shall forever foreclose all right and equity of redemption in the property sold.³ And when the mortgagee takes possession after condition broken, he has the legal title and can sell and execute the powers conferred in the mortgage without the aid of a court of equity.⁴

§ 1108. **Montana.**—All actions of foreclosure of chattel mortgages, or the enforcement of any lien against personal property, shall be commenced and conducted in the same manner as foreclosures of mortgages and liens against real property. In actions for foreclosure of mortgages, the court may, by judgment, order a sale of the mortgaged property, or as much as may be necessary, and direct the application of the proceeds of the sale to the payment of the costs of the court and expenses of sale, and the amount due to the mort-

¹ *Ferguson v. Hogan*, 25 Minn. 135.

² Code, § 2667.

³ Rev. Stat. § 3310.

⁴ *Keating v. Hannenkamp*, 100 Mo. 161.

gagee. If it appears from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment shall be docketed for such balance against the defendant personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases in which execution may issue.

Any surplus will be paid to the person entitled to it. If the debt be not due at one time, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease, and afterwards, as often as more becomes due for principal or interest, the court, on motion, may order more to be sold. If the property cannot thus be sold without injury to interested parties, the whole may be ordered sold in the first instance, and the entire debt and costs paid, making a proper rebate for interest. A clause may be inserted in the mortgage allowing the sheriff of the county in which the property, or any portion thereof, is situated, to execute a power of sale therein granted to the mortgagee, in which case the sheriff may advertise and sell the property as provided, and the mortgagee or his representative or his assigns may in good faith purchase the property so sold, or any part thereof.¹

§ 1109. **Nebraska.**—After default, and if no suit is instituted at law to recover the debt, or if begun, has been withdrawn, and the mortgage has been duly recorded, such mortgage may be foreclosed. Notice that such mortgage will be foreclosed, by sale of the property or some part thereof, shall be given as follows: By advertisement published in some newspaper printed in the county in which such sale is to take place, or in case no newspapers are printed therein, by posting up notices in at least five public places in said county, two of which shall be in the precinct where the mortgaged property is to be offered for sale, and such notice shall be given at least twenty days prior to the day of sale. Such notice shall contain the name of the

¹ Code, §§ 346-348; Act of February 19th, 1881.

mortgagor and mortgagee, and the assignee of the mortgage, if any, the amount claimed to be due, a description of property conforming, substantially, with that contained in the mortgage, the time and place of sale.

Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale shall be postponed; or in case no newspaper is published in the county in which such sale is to be had, by posting a notice of such adjournment in some conspicuous place, at the place designated in the original notice posted for the sale to be had.

Such sale shall be at public auction in the county where the mortgage was first recorded, or in any county where the property may have been removed by consent of parties and in which the mortgage was duly recorded, and in view of said property.

The mortgagee may fairly and in good faith purchase any of the mortgaged property at such sale. When a mortgage shall have been foreclosed as herein provided, all rights of equity of redemption which the mortgagor may or might have had shall be and become extinguished.¹

§ 1110. **Nevada.**—In action to recover the mortgage debt, judgment shall be rendered for the amount found due the mortgagee, and the court shall have power, by its decree or judgment, to order a sale of the property, or such part thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit and the amount due to the plaintiff. If it shall appear from the sheriff's return that there is a deficiency, a judgment shall be docketed for such balance against the mortgagor personally liable for the debt, and shall be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the

¹ Gen. Stat. ch. 46, §§ 1-8.

clerk of the court, in like manner and form as upon other judgments, to collect such balance. If there be a surplus it shall be paid to the person entitled to it, and in the meantime may be deposited in court.

If the debt is not all due, so soon as sufficient of property has been sold to satisfy the amount due, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. If the property cannot be thus sold without injury to the parties, the whole may be ordered sold in the first instance, and the entire debt and costs paid, a proper rebate for interest being allowed.¹

§ 1111. **New Hampshire.**—After condition broken the mortgagor may redeem the property by paying or tendering to the mortgagee the amount due on such mortgage, with all reasonable expenses, at any time before a sale thereof, as provided by statute.

The mortgagee may, at any time after thirty days from the time of default, sell the mortgaged property or any part thereof at auction, notice of the time, place and purposes of such sale being posted at two or more public places in the town in which such sale is to be, four days, at least, prior thereto.

The mortgagee shall notify the mortgagor of the time and place of sale, either by notice in writing delivered to the mortgagor, or, if a corporation, to the person on whom legal process may be served, or left at his abode, if within the town, at least four days previous to the sale. If the mortgagor does not reside in the town, such notice sent by mail shall be sufficient.

The mortgagee may be a purchaser at such sale, and the proceeds of such sale shall be applied by him to the payment of the demand secured by such mortgage, and the expenses of keeping and sale; and the residue shall be paid to the mortgagor on demand.²

¹ Com. Laws, §§ 1309-1311.

² Gen. Stat. ch. 137, §§ 18-21.

Under the statute the mortgagee is liable in case to the mortgagor for selling against the latter's objection, before the expiration of the thirty days. Judge Smith says that while the mortgagee's possession may be lawful, he cannot sell the property except by consent of the mortgagor, until thirty days from the time of condition broken, as the mortgagor has the right, during the thirty days after the note matured, to redeem. "This right would be defeated if the mortgagee could, in the meantime, sell the property ; or if not defeated, and if the mortgagor could pursue and recover it from the purchasers, he could not be subjected to the trouble, expense and vexation of following it in the hands of perhaps widely-scattered claimants. As the sale of the defendant was premature, she is liable to him in damages, under the count in case. The count in trover is not sustained."¹

§ 1112. **New Jersey.**—The foreclosure of chattel mortgages is under the general jurisdiction of the Court of Chancery ; and the proceedings are the same as those had for the foreclosure of mortgages of real estate. In foreclosure of a mortgage which may relate to real or personal property, all persons claiming an interest in any incumbered property, by an instrument which should be recorded, but fail to thus record, shall be bound by the proceedings in such suit. If the instrument be recorded, then the party holding it may cause himself to be made a party to such suit, by petition. The petition must set forth, in each case, the instrument at length, and the title and interest of such party, in such a manner as to show that he has an interest in the subject-matter, and is a proper party in the suit. Or a chattel mortgage, after breach of condition, may be, and usually is, foreclosed by a sale of the mortgaged property. Such sale must be at public auction, and shall be advertised and conducted in the same manner as sales of personal property under execution. The mortgagee is not entitled to more than the amount of his mortgage debt and costs,

¹ *Adams v. Rice*, 18 At. Rep. 652.

and the surplus, if any, of chattels or proceeds thereof, remaining after satisfaction of such debt and costs, must be given to the mortgagor.¹

§ 1113. **New Mexico.**—After default the mortgagee may proceed to sell the mortgaged property, or so much thereof as shall be necessary to satisfy the mortgage and costs of sale, having first given notice of the time and place of sale, by written or printed handbills, posted up in at least four public places in the township in which the property is to be sold, at least ten days previous to the day of the sale. If the mortgagor shall have obtained possession of the property either before or after condition broken, the mortgagee, or any subsequent mortgagee, may demand in writing a sale of the property. In such case the mortgagee shall proceed to sell the property, having first given the notice as provided. If, after satisfying the mortgage and costs of sale, there shall be any surplus remaining, the same shall be paid to any subsequent mortgagee entitled thereto or to the mortgagor or his assignee.²

§ 1114. **New York.**—Chattel mortgages are usually foreclosed by the mortgagee taking possession after breach of condition and selling the same according to the agreement of the parties, after giving due notice thereof, and such sale is binding. The mortgagee may sell the property, after due notice, at public sale, without suit, although the mortgage contains no power of sale; but if the mortgagee desires to recover any deficiency that may be after applying the proceeds of the sale, he must then proceed in equity.³

§ 1115. **North Carolina.**—In foreclosing mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after sale of the mortgaged premises, in cases in

¹ Rev. Stat. p. 118, § 78; Rev. Stat. and Sup. Rev. Stat. tit. "Mortgages."

² Gen. Laws, p. 65.

³ *Dane v. Mallory*, 16 Barb. 46; *Talman v. Smith*, 39 Barb. (N. Y.) 390.

which the mortgagor shall be personally liable for the debt secured by such mortgage.¹

A debt not exceeding \$300 may be secured by a deed of trust of personal property containing a power to sell said property, or so much thereof as may be necessary, by public auction, for cash, first giving twenty days' notice at three public places; the mortgagee must apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay the surplus to the mortgagor.²

§ 1115*a*. **North Dakota.**—A mortgagee may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed for enforcing a pledge. Before property pledged can be sold, the pledgee must demand performance of the debtor, if he can be found. The pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before sale as will enable the pledgor to attend. The sale by the pledgee of the property must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect of auction sales of similar property, and must be for the highest obtainable price. A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states or corporations; but he may collect the same when due.

A pledgee may foreclose the right of redemption by judicial sale under the directions of a competent court, and may be authorized by the court to purchase at the sale.³

A chattel mortgage may be foreclosed by public sale of the property, on ten days' public notice, or by action in the District Court; and in a justice's court in cases where the amount of lien claimed is less than \$100.⁴

In foreclosure by statute, it is provided the notice must be

¹ Bat. Rev. ch. 17, § 126.

² Bat. Rev. ch. 35, §§ 81-83.

³ Civil Code, § 1748.

⁴ Civil Code, §§ 1742-1755.

published in a newspaper one week before sale, unless publication be waived, for sales at particular places on Saturdays, and for report of sale to be made in ten days and filed with the register of deeds.¹ The mortgagee or his assignee may be a purchaser at the sale.²

A mortgagee who takes possession of the mortgaged property and sells it at private sale loses his lien, but the mortgage debt is not thereby released.

One claiming under a sale known by him to be private, cannot maintain a claim to the possession thereof as against the mortgagor's lessee under the lease made subsequently to the mortgage.³

§ 1116. **Ohio.**—Courts of Chancery have general jurisdiction of mortgage foreclosures.

The nature of the suit is not that of a proceeding *in rem*, but *in personam*; and the court of equity has full authority acting upon the parties, to deal and adjudicate in respect to the rights of the parties in the property, without regard to where the property itself is located, as the ends of justice may require.⁴

§ 1116a. **Oklahoma Territory.**—Chattel mortgages are generally made with a power of sale in the mortgagee. After breach of condition the mortgagee may foreclose the mortgage by complying with the terms, and is not obliged to resort to the courts.⁵

§ 1117. **Oregon.**—Mortgages are foreclosed by action. The decree may be enforced by an execution, as an ordinary decree for the recovery of money, except when a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold. When the decree is in favor of different persons, not united in

¹ Act of March 8th, 1889.

² Act of March 13th, 1885.

³ *Everett v. Buchanan*, 2 Dak. 249.

⁴ *Means v. Worthington*, 22 Ohio St. 622.

⁵ Gen. Laws, tit. "Mortgages."

interest, it shall be deemed a separate decree as to such persons, and may be enforced accordingly.¹

Whenever, in any mortgage of goods and chattels, the parties to such mortgage shall provide the manner in which such mortgage may be foreclosed, such mortgage, upon breach of condition, may be foreclosed in the manner therein provided, and not otherwise. If no manner is stipulated, then, in case the consideration of such mortgage shall not exceed \$500, the same may be foreclosed, and the property sold by the sheriff, or any constable of the county in which such mortgage has been filed, upon the written request of the mortgagee, upon such notice, and in the manner provided by law for the sale of personal property upon execution; and if the consideration shall exceed the sum of \$500, the same may be foreclosed by an action at law in the Circuit Court of the county in which such mortgage may have been filed.

Any surplus shall be deposited with the clerk of the court, for the mortgagor.²

§ 1118. **Pennsylvania.**—After default, it shall be lawful for the mortgagee, after having given the mortgagor thirty days' notice, either personally or by public advertisement, inserted four times, at intervals of one week each, in some daily newspaper, if any, and if not, in a weekly paper published in the county wherein the mortgage is recorded, to cause the said chattels to be sold at public auction. Any surplus shall be paid to the mortgagor. The mortgagor, after default, may redeem at any time before the property is sold, by the payment of the debt and costs.³

§ 1119. **Rhode Island.**—After default the mortgagor has sixty days to redeem, unless the property shall in the meantime have been sold in pursuance of the contract between the parties.

The person entitled to redeem the property shall pay or

¹ Gen. Laws, pp. 196, 197.

² Hill's Code, § 8838.

³ Purdon's Dig. p. 2005, §§ 14, 15.

tender to the mortgagee the sum due, with all reasonable charges. If the property then is not forthwith restored, the person entitled to redeem may recover it in an action of replevin, or may recover such damages as he may have sustained, in any proper action.

Any person entitled to foreclose the equity of redemption in personal property, may prefer a bill to foreclose the same to the Supreme Court sitting in the county in which the mortgagor may reside, if in the State, and if not, then in any county in this State, which bill may be heard, tried and determined by said court, according to the usages in chancery and the principles of equity.

At any sale at public auction the mortgagee may purchase the property, provided that notice in writing of the mortgagee's intention to purchase shall be given to the mortgagor, or left at his last and usual place of abode, twenty days prior to the time of sale at which he proposes to purchase as mortgagee, and the proper evidence that such notice has been given shall be in the possession of the auctioneer at the time the sale takes place; or that such mortgagee shall in his public advertisement of sale give notice that it is his intention to bid upon such property as advertised for sale. Foreclosure is usually by sale under power in the mortgage.¹

§ 1120. **South Carolina.**—Mortgages may be foreclosed by suit in the nature of a suit in equity. When mortgaged personal property is sold under power for the purpose of satisfying the debt secured, the mortgagee shall advertise the same for fifteen days, unless the person making such mortgage shall consent to a sale in some other way, or on some other notice, such consent to be expressed in writing.²

§ 1120a. **South Dakota.**—A chattel mortgage may be foreclosed by public sale of the property, on ten days' public notice, or by action in the District Court, and in the justice's

¹Pub. Stat. ch. 176.

²Gen. Stat. §§ 2346-2348.

court in cases where the amount of lien claimed is less than \$100.¹

Foreclosure not by action shall be void unless made in accordance with the statute, which provides for publication in a newspaper one week before sale, unless waived, for sales at public places on Saturdays, and for report of sale to be made in ten days and filed with the register of deeds.²

The mortgagee or his assignee may be a purchaser at the sale.³

§ 1121. **Texas.**—Foreclosure is by suit, and the mortgagee may have judgment to recover his debt, damages and costs, and an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to take and sell, as under execution, in satisfaction of the judgment. If the property is insufficient to satisfy the debt, the sheriff can make the balance due out of any other property of the mortgagor, as in case of ordinary executions.

Justices of the peace have jurisdiction to foreclose mortgages and enforce liens on personal property, when the amount is \$200 or less, exclusive of interest.⁴

In a suit to foreclose a chattel mortgage a certified copy thereof is admissible in evidence, as against the single objection that it is "a copy," where it appears that the original is filed in another county and cannot be withdrawn, though the statute⁵ regulating the registration of chattel mortgages provides that a copy of such instrument, certified by the clerk, shall be received in evidence of the fact that it was received and filed according to the clerk's indorsement, "but of no other facts."⁶

§ 1122. **Utah.**—In an action to recover for a debt secured

¹ Civil Code, §§ 1742-1755.

² Act of March 8th, 1889.

³ Act of March 13th, 1885.

⁴ Rev. Stat. art. 1340.

⁵ Sayles' Stat. art. 3190b, § 3.

⁶ *Grounds v. Ingram*, 75 Tex. 509.

The equity of redemption continues until the sale; then the redemption is extinguished.

by a chattel mortgage, judgment shall be rendered for the amount due the mortgagee, and the court may direct a sale of the property, or such part of it as may be necessary, and the application of the proceeds to the payment of the costs and expenses and other legal costs, and the amount due the mortgagee. If it shall appear from the return of the marshal or the sheriff of the county that there is a deficiency of such proceeds, and a balance still due the mortgagee, the judgment shall be docketed, and become a lien upon the real estate of the mortgagor, and an execution may issue thereon in like manner as upon other judgments. Any surplus shall be paid to the person entitled to it. If the debt is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease, and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper. It is lawful to insert the usual clauses of trust deeds, with power of sale, and without the right of redemption, on such notice and advertisement, and in such manner as is provided for sale of personal property on execution, in trustee or in sheriff of county wherein the property is situate; and at any sale made under the power of trustee or sheriff, the mortgagee, his representatives or assigns, may, in good faith, purchase all or any part of the property sold.¹

§ 1123. **Vermont.**—Upon default the mortgagor, or a person holding a subsequent mortgage, may redeem the same by paying or tendering to the mortgagee the amount due on such mortgage, with all reasonable charges, at any time before the sale thereof, or foreclosure and time of redemption expired.

The mortgagee may, at any time after thirty days from

¹ Com. Laws, §§ 1471–1473; Laws of 1884, pp. 28–32.

the time of condition broken, cause the mortgaged property, or any part thereof, to be sold at public auction by some public officer at some public place in the town where the mortgagor resides or where his property is situate, notice of the time, place and purpose of such sale being posted at two or more public places in such town at least ten days prior thereto. The mortgagee shall notify the mortgagor, and persons holding subsequent mortgages, of the time and place of sale, either by notice in writing delivered to him or left at his abode, if within the town, or sent by mail if he does not reside in such town, at least ten days previous to the sale. The proceeds shall be applied to the payment of the debt and costs, and the residue, if any, shall be paid to the persons holding subsequent mortgages, in their order, which shall be applied to liquidate the claims secured by such mortgages, and if there be no subsequent mortgage, then to the mortgagor or persons holding under him, on demand.¹

The statute² provides that the mortgagee may, after thirty days from the time of condition broken, "cause the mortgaged property, or part thereof, to be sold," &c. Under this clause he may elect to sell it all. He cannot be restricted by the amount of the actual debt. The title to the whole is in him, and he must be left free to foreclose the mortgagor's equity in the whole in the method provided by law. The mortgagor's rights are sufficiently protected by the provision that the balance of the proceeds of the sale, after satisfying the mortgage debt, with costs and expenses, and subsequent mortgages, if there be any, shall be paid over to him on demand.³

§ 1124. **Washington.**—Chattel mortgages, after default, may be foreclosed by notice and sale, or they may be foreclosed by action in the District Court having jurisdiction in the county in which the property is situated. The notice must contain a full description of the property, with time

¹ Rev. Laws, §§ 1977-1979.

² Rev. Laws, § 1977.

³ *Ingalls v. Vance*, 61 Vt. 582.

and place of sale, a statement of the amount due, and must be signed by the mortgagee or attorney. Such notice shall be placed in the hands of the sheriff or other proper officer, and shall be personally served in the same manner as is provided by law for the service of a summons; provided, that if the mortgagor cannot be found in the county when the mortgage is being foreclosed, it shall not be necessary to advertise the notice or affidavit in a newspaper, but the general publication shall be sufficient, as follows: After notice has been served upon the mortgagor, it must be published in the same manner, and for the same length of time, as required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. If any balance of the purchase-price remains it shall be disposed of in the same manner as surplus proceeds of sales are on execution.

Where the debt is not due, and the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost or removed, he shall have the right to an immediate action in the proper court for the recovery of his debt, and the court may make any order it may deem fit, to secure said property so as to make it available for the satisfaction of the debt.¹

§ 1125. **Wisconsin.**—Upon taking possession by the mortgagee, the mortgagor is divested of all interest in the property at law; he still has an equity of redemption which a court of equity will protect and foreclose.²

There can be no sale of any personal property taken by virtue of a chattel mortgage, except by the consent of the mortgagor, before the expiration of five days from the time when the property was actually taken.³ But a mortgagor may waive the benefit of the statute, and effectually does so by consenting in writing to the sale of the property by the mortgagee "at once, without putting up any notices, or de-

¹ Code, § 1986.

² *Nichols v. Webster*, 1 Chand. 203; *Flanders v. Thomas*, 12 Wis. 410.

³ *Laws of 1887*, ch. 294.

laying the sale of said property for five days, or any length of time.”¹

§ 1126. **Wyoming.**—A chattel mortgage containing a power of sale may be foreclosed without resorting to court. Notice that such mortgage will be foreclosed by a sale of the mortgaged property, or some proof thereof, shall be given by an advertisement published in some weekly newspaper published in the county in which the sale is to take place, for three times in three consecutive issues of such weekly newspaper; in case no weekly newspaper is published in said county, then by posting notices in at least three public places in said county, one of which shall be at the place designated for the sale to take place, at least three weeks prior to the day of sale. The notice must state the date of the mortgage and where recorded, the name of the mortgagee and the mortgagor, the amount claimed to be due thereon, a description of the mortgaged property, conforming substantially with that contained in the mortgage, and the time and place of sale. Such sale shall be at public auction in the county where the mortgage was first recorded, or in any county where the property may have been removed by consent of the parties, and in which the mortgage was duly recorded, and in view of said property.

The mortgagee may fairly and in good faith purchase any of the mortgaged property offered for sale. Such foreclosure will extinguish the equity of redemption.²

¹Stevens v. Breen, 75 Wis. 595. The court says that the mortgagor can waive the benefit of the statute, and the sale can then be made at once.

²Rev. Stat. §§ 70-90.

CHAPTER XXI.

REDEMPTION.

ARTICLE I.—MORTGAGOR'S RIGHT TO REDEEM.

1127. At Common Law.

1128. In Equity.

1129. Waiver of Right to Redeem.

1130. Time to Redeem.

1131. Who May Redeem.

§ 1127. **At Common Law.**—At common law a mortgage, not a pledge, of personal property, transferred the property absolutely to the mortgagee upon breach of the condition. No process of foreclosure was necessary, and no right of redemption remained.

Still, some authorities held that the mortgagor might maintain a bill in equity to redeem within a reasonable time after forfeiture, but this rule was neither clearly settled nor generally admitted.¹

The common-law doctrine held that the mortgagee, after forfeiture, had the absolute title, and may sell or otherwise dispose of the mortgaged property.²

The mortgage is held to be a grant *in præsentia*; subject to be defeated on payment of the money intended to be secured. The legal title to those chattels passes by the mortgage, and vests in the mortgagee. Unquestionably, after forfeiture, the mortgagee has the legal title, and is, in law, the absolute owner of the chattels. It is difficult to conceive of a title of this kind with restrictions to prevent the mortgagee, after forfeiture, to transfer it to another.³

¹ *Taber v. Hamlin*, 97 Mass. 489.

² *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303; *Westerdell v. Dale*, 7 Term R. 306; *Ryall v. Rowles*, 1 Ves. 365.

³ *Robinson v. Campbell*, 8 Mo. 366; *Hall v. Snowhill*, 2 Gr. (N. J.) 18; *Holmes v. Hall*, 3 Dev. (N. Car.) 98; *Langdon v. Buel*, 9 Wend. (N. Y.) 83;

§ 1128. **In Equity.**—When the mortgage is regarded as a conditional sale, if the property is not redeemed at the day the debt is due, it is forfeited.¹

But this rule does not apply to cases of delivery of property in the way of security, or to cases where the delivery is made expressly as collateral security, and in no respect as a sale. From the earliest times there seemed to be a recognized distinction between such mortgages in the way of conditional sales and mortgages in the way of security or pledge.

Under the equitable doctrine, Courts of Chancery have jurisdiction to decree the redemption of chattels mortgaged, as well as real estate. And although after condition broken the legal title to the property vests in the mortgagee, the mortgagor has the right to redeem by the payment or tender of payment of the amount the mortgage was given to secure, and the mortgagor of personal property, after condition broken, has an equity of redemption which may be asserted, if he brings his bill to redeem within a reasonable time.¹ Though the redemption of mortgaged chattels originally belonged to the jurisdiction of the chancery court, it is not divested of this jurisdiction, even though it may now be exercised by courts of law.²

Judge Currey says: "The cases which hold that at law the title of the mortgagee to the chattels mortgaged becomes absolute upon the breach of the stipulation to pay at a particular day, recognize that the mortgagor has an equitable

Brown v. Bement, 8 Johns. (N. Y.) 96; *Ackley v. Finch*, 7 Cow. (N. Y.) 292; *Case v. Boughton*, 11 Wend. (N. Y.) 109; *Smith v. Acker*, 23 Wend. (N. Y.) 667; *Capper v. Dickinson*, 1 Rolle 315.

¹ 2 Story's Eq. §§ 1014, 1015, 1030; 1031; *Hart v. Ten Eyck*, 2 Johns. (N. Y.) Ch. 62; *Kemp v. Westbrook*, 1 Ves. 278; *Slade v. Rigg*, 3 Hare 35.

² *Davis v. Hubbard*, 38 Ala. 185; *Flanders v. Chamberlain*, 24 Mich. 305; *Smith v. Coolbaugh*, 19 Wis. 106; *Flanders v. Barstow*, 18 Me. 357; *Wilson v. Brannan*, 27 Cal. 258; *Heyland v. Badger*, 35 Cal. 404; *West v. Crary*, 47 N. Y. 423; *Hinman v. Judson*, 13 Barb. (N. Y.) 628; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Dupuy v. Gibson*, 36 Ill. 197; *Hammers v. Dole*, 61 Ill. 307; *Wylde v. Crane*, 53 Ill. 490; *Waite v. Dennison*, 51 Ill. 319; *Blodgett v. Blodgett*, 48 Vt. 32; *Foster v. Ames*, 1 Low. D. C. 313; *Stoddard v. Denison*, 38 How. Pr. (N. Y.) 296; *Pratt v. Stiles*, 17 How. Pr. (N. Y.) 211; *Charter v. Stevens*, 3 Den. (N. Y.) 33; *Saxton v. Williams*, 15 Wis. 292.

right or interest in the property of which he may avail himself by paying the debt due and thus redeeming the property; and as long as the right of redemption remains in the mortgagor, it may be said, viewing the subject from an equitable standpoint, that the title of the mortgagee is not in every instance absolute. In mortgages of personal property there exists, after condition broken, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his suit to redeem within a reasonable time."¹

The mortgagee has then two remedies, either of which he may pursue at his election. He may resort to a court of equity to compel a redemption or to foreclose the mortgagor's right to redeem, or he may obtain the same object by a fair public sale of the property after due notice to the mortgagor.²

The mortgagor's right of redemption remains until foreclosed by judicial sentence, in the one case, or sale after due notice in the other; and this right may be enforced in equity.³

No necessity exists, in case of foreclosing a chattel mortgage, to resort to a court of equity. The mortgagee, upon due notice, may sell the personal property, as he could under the civil law, and the title, if the sale be *bona fide* made, will vest absolutely in the vendee. And it makes no difference whether the personal property mortgaged consists of goods or of stock, or of personal annuities.⁴

Judge Bailey says that the mortgagee may treat the property as his own, subject only to the mortgagor's right of redemption in equity, and his election to hold the property will be treated as a satisfaction of his debt, at least to the extent of the value of the property at the time he took it into possession. If he intends to sell or foreclose, he must

¹ *Wilson v. Brannan*, 27 Cal. 258. See, also, 2 Story's Eq. § 1081.

² *Charter v. Stevens*, 3 Denio (N. Y.) 33.

³ *Wilson v. Brannan*, 27 Cal. 258. See, also, *Hammond v. Morgan*, 101 N. Y. 179; *Learned v. Tillotson*, 97 N. Y. 1; *Carroll v. Deimel*, 95 N. Y. 252; *Colie v. Tift*, 47 N. Y. 119; *Chapin v. Thompson*, 58 How. Pr. (N. Y.) 46.

⁴ *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; Story's Eq. §§ 1008, 1009.

exercise his right to do so within a reasonable time, or he will be chargeable with the full value.¹

§ 1129. **Waiver of Right to Redeem.**—A mortgagor not having been barred from the equity of redemption by foreclosure or sale, has the right to redeem, unless he has lost it by lapse of time. While it is true that the right to redeem personal property which has been mortgaged may be lost by lapse of time, it is also true that there is no rule universally applicable stating the time within which it must be asserted. And the mortgagor cannot debar himself of his equitable right to redeem by an agreement in the mortgage to waive this claim on forfeiture. Judge Royce, delivering the opinion of the court, said: "While it is true that the right to redeem personal property which has been mortgaged may be lost by lapse of time, it is at the same time true that there is no rule of universal application prescribing the time within which the right must be barred. The party must insist upon his right within a reasonable time, and what is a reasonable time must be determined from the evidence." Thus, a mortgagor not having been barred of his equity of redemption under a mortgage, by foreclosure or sale, and having filed his bill within a reasonable time, has still a right to redeem by paying the agreed sum secured, less the value of the use of the property taken by the mortgagee while in his possession, and the value of any part thereof by him sold or destroyed, and that it is not necessary, in Vermont, for the mortgagor, before filing his bill to redeem, to tender the sum due.²

The fact that the possession of mortgaged personal property has been surrendered to the mortgagee by the mortgagor after condition broken, will not prevent a sheriff holding executions in favor of other creditors of the mortgagor from levying upon and selling the equity of redemption until the mortgagee has, by legal notice and sale of the

¹ *Whittemore v. Fisher*, 132 Ill. 243.

² *Lavigne v. Naramore*, 52 Vt. 267. See, also, *Bunacleugh v. Poolman*, 3 Daly (N. Y.) 236.

goods, or by judicial foreclosure and sale, cut off the equity of redemption.

Thus, where it is provided in a chattel mortgage that, in default of payment of the mortgage debt, the mortgagor shall deliver the property to the mortgagee, such delivery will not vest the absolute ownership of the property in the mortgagee or free the property from the equity of redemption.¹

§ 1130. **Time to Redeem.**—Some of the States provide within what time the right to redeem shall be allowed the mortgagor.² But where no such time is designated, the mortgagor, when he has such right, must redeem within a reasonable time.³ That reasonable time may be well determined by analogy to the statute of limitations applicable to actions at law for the recovery of personal property. Equity will not entertain a bill for the redemption after the expiration of the time which the statute of limitations provides.⁴

§ 1131. **Who May Redeem.**—Any party who has a substantial interest in the mortgaged property may redeem. Thus, a junior mortgagee has a right to redeem before sale under the prior mortgage.⁵ The right of the grantee in the second mortgage to redeem the property, continues until foreclosure of the first mortgage, unless defeated by the property being taken and sold by a third party. The grantee may maintain an action of trover against the officer who, before the title of the first mortgagee becomes absolute, attaches and sells the property mortgaged, such grantee being by the act of the officer deprived of his right of redemption.⁶

¹ *Landers v. George*, 49 Ind. 309, opinion by Downey, J. See, also, *State v. Sandlin*, 44 Ind. 504.

² *Winchester v. Ball*, 54 Me. 558; *Clapp v. Glidden*, 39 Me. 448.

³ 2 Story's Eq. § 1031.

⁴ *Stoddard v. Denison*, 38 How. Pr. (N. Y.) 296; *Hatfield v. Montgomery*, 2 Port. (Ala.) 58; *Byrd v. McDaniel*, 33 Ala. 18. See, also, *Hyde v. Dallaway*, 2 Hare 528; *Edsell v. Buchanan*, 2 Ves., Jr. 83; *Reeve v. Hicks*, 2 Sim. & Stu. 403; *Hansard v. Hardy*, 18 Ves. 455; *Lavigne v. Naramore*, 52 Vt. 267; *Bartlett v. Thynes*, 2 Hill (S. Car.) Eq. 171.

⁵ *Smith v. Coolbaugh*, 21 Wis. 427.

⁶ *Treat v. Gilmore*, 49 Me. 34.

An attaching creditor may redeem so soon as his attachment becomes a lien; the same rule applies to an execution creditor.¹

ARTICLE II.—RIGHT OF ACTION.

1132. Relief to Mortgagor.

1133. Massachusetts Rule.

1134. Requisites of a Bill.

1135. New York Rule.

1136. When Mortgage is Open to Redemption.

§ 1132. **Relief to Mortgagor.**—If the mortgagee refuses to render an account, without which the mortgagor cannot ascertain the amount so as to make payment or tender for the redemption of the property, relief will be afforded to him in equity.²

Relief in equity can be granted *ex æquo et bono* only upon payment or tender of payment of the whole mortgage debt.³

If the mortgagee has disposed of the property, a court of equity will give complete relief by decreeing damages.⁴

If the mortgaged property has been disposed of, so that it cannot be redelivered, the court may decree to him the amount or value of his interest in the property.⁵

But when mortgaged property is sold, the mortgagor cannot claim the benefit of the exemption laws when the mortgage is foreclosed,⁶ nor can his widow make such a claim.⁷ If part of his property is mortgaged he can claim

¹ *Scott v. Henry*, 13 Ark. 112; *Lucking v. Wesson*, 25 Mich. 443; *Hinman v. Judson*, 13 Barb. (N. Y.) 629.

² *Boston & F. I. W. v. Montague*, 108 Mass. 248.

³ *Stoddard v. Denison*, 38 How. Pr. (N. Y.) 296.

⁴ *Bragelman v. Daue*, 69 N. Y. 69; *Stoddard v. Denison*, 38 How. Pr. (N. Y.) 296.

⁵ *Blodgett v. Blodgett*, 48 Vt. 32. See, also, *Metzler v. James*, 12 Colo. 322.

⁶ *Conway v. Wilson*, 44 N. J. Eq. 457; *Patterson v. Taylor*, 15 Fla. 336; *Flanders v. Wells*, 61 Ga. 196; *Love v. Blair*, 72 Ind. 281; *Fejavary v. Broesch*, 52 Iowa 88; *Jones v. Scott*, 10 Kans. 33; *Moxley v. Ragan*, 10 Bush (Ky.) 156; *Frost v. Shaw*, 3 Ohio St. 270; *Cronan v. Honor*, 10 Heisk. (Tenn.) 533.

⁷ *Recker v. Kilgore*, 62 Ind. 10.

that not mortgaged, under the exemption laws. Thus, if he has two cows, one of which is mortgaged, he can claim the other as exempt under the law,¹ provided the mortgage is duly recorded, or gives actual notice of such mortgage, in those States where actual notice is sufficient.² The mortgagor can resort to his legal remedies when his exempt property is seized, and compel the officer to restore it.³

The mortgage of exempt chattels does not render them, or the equity of redemption in them, liable to levy and sale.⁴

§ 1133. **Massachusetts Rule.**—A mortgagor in this State cannot maintain a bill in equity for relief, a remedy being provided by statute, unless a case is disclosed where, from the nature of the property mortgaged, the peculiar relations of the parties, or the inability to ascertain the amount of the debt, it is evident that the statutory remedy will not protect the mortgagor's right.⁵

§ 1134. **Requisites of a Bill.**—A bill to redeem must set forth the facts upon which the action is based, showing a right to redeem, alleging the amount due on the day of maturity, and that a payment of the amount due was tendered in due season, which was refused, and a prayer for relief by redeeming the property.

But a bill in equity which sets forth the facts upon which the equitable right to redeem mortgaged chattels, after condition broken and possession taken by the mortgagee, defends, and alleges that an amount stated was due on a specified day, and that complainant had offered to pay that amount, although it does not in so many words offer to pay what may be found to be due upon the mortgage debt, contains all the substantial requisites of a bill to redeem where the question

¹ Tryon v. Mansir, 2 Allen (Mass.) 219; Greenleaf v. Sanborn, 44 N. H. 16.

² McCoy v. Dail, 6 Baxt. (Tenn.) 137.

³ Brainard v. Simmons, 67 Iowa 646; Rice v. Nolan, 33 Kans. 28.

⁴ Jones v. Scott, 10 Kans. 33; Collett v. Jones, 2 B. Mon. (Ky.) 19; Buckley v. Elliott, 52 Mich. 1; State v. Carroll, 24 Mo. App. 358; McGivney v. Childs, 41 Hun (N. Y.) 607.

⁵ Gordon v. Clapp, 111 Mass. 22. See, also, Boston & F. I. W. v. Montague, 108 Mass. 248; Bushnell v. Avery, 121 Mass. 148.

arises upon a hearing upon the evidence and merits without a demurrer.¹ And a complainant's general prayer for other and further relief must be treated as a prayer to be allowed to redeem, that being the appropriate and only equitable relief, if any, which the case would entitle him to.²

If the tender be not alleged in the bill, then a tender of the amount due must be proved, and that the tender was made before bringing the action.³

Judge Horton, of the Kansas Supreme Court, speaking of tender, says: "Some of the courts hold that relief can be granted only to a mortgagor upon payment, or tender of payment, of the whole mortgage debt, and then, although the mortgagee has disposed of the property, a court will give relief by decreeing damages. But in this State the distinction between courts of equity and courts of law has been abolished, and it were useless and unnecessary to tender any payment of the mortgage debt, if the plaintiff has unlawfully, fraudulently and unfairly converted to his own use the property of the defendant of a much greater value than the debt, and, subsequently to such conversion, has disposed of large portions of the property, so as to disable him from returning the same, or allowing any redemption thereof."⁴

So, a mortgagee in possession, who sells part of the mortgaged property to pay the debt, and then denies the debtor's title to the rest, is liable in trover, without either tender or demand.⁵

§ 1135. **New York Rule.**—Before a suit can be maintained to redeem, the mortgagor must pay or tender the whole amount of the debt due, and in the bill allege payment or tender, which must be proved as averred, as the basis of the

¹ *Flanders v. Chamberlain*, 24 Mich. 305.

² *Swarz v. Sears, Walker* (Mich.) Ch. 170; *Barton v. May*, 3 Sandf. (N. Y.) Ch. 450; *Bartlett v. Fellows*, 47 Me. 53.

³ *Tallon v. Ellison*, 3 Nebr. 63; *Halstead v. Swartz*, 1 T. & C. (N. Y.) 559; and see *Adams v. Nat. Bank*, 4 Nebr. 370.

⁴ *Wygal v. Bigelow*, 42 Kans. 477.

⁵ *Iler v. Baker* (Mich.), 46 N. W. Rep. 377.

remedy;¹ and the tender, if made after law day, must be kept good and paid into court at the trial.²

§ 1136. **When Mortgage is Open to Redemption.**—If a mortgagee has a decree of foreclosure and afterwards brings an action of debt on the bond given at the same time for the payment of the money and performance of the covenants in the mortgage, such action opens again the foreclosure and lets in the equity of redemption of the mortgagor.³

The Rhode Island Supreme Court decides that the mortgagee, by suing for the full amount of the debt secured to him by the mortgage, and taking judgment therefor, must be held to have disclaimed the foreclosure, if the mortgage was ever foreclosed, and to have opened the mortgage to redemption. If the debt, by force of the judgment, subsists as a valid claim for its full amount, and if the debt so subsists, the mortgage, which was given only as security for it, must also still subsist and be redeemable.

It has been questioned whether an action for the deficiency, when the mortgage was insufficient to satisfy the debt, does not also open the foreclosure, it being assumed as beyond question that an action prosecuted to final judgment for the full amount would have that effect; and when a mortgagee takes judgment, reviving the judgment in full, it opens the mortgage to redemption.

Where the mortgage was given to two mortgagees, and one assigns his claim to the other, the court says: "Whether, if this be so, the mortgage is wholly open to redemption or only proportionately to the debt thereby secured to the defendant [the assignee], is an interesting question which has not been discussed at the bar nor considered by the court. At present we only decide that the mortgage, as original security for the debt due the defendant, is open to redemption."⁴

¹ *Stoddard v. Dennison*, 38 How. Pr. (N. Y.) 296; *Hall v. Ditson*, 55 How. Pr. (N. Y.) 19; *Halstead v. Swartz*, 46 How. Pr. (N. Y.) 289.

² *Noyes v. Wyckoff*, 30 Hun (N. Y.) 466.

³ *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317.

⁴ *Clarke v. Robinson*, 15 R. I. 231.

ARTICLE III.—ACCOUNTING BY MORTGAGEE.

1137. Liability of the Mortgagee to Account After Taking Possession.

1138. Sales of Mortgagee After Taking Possession.

1139. Adjustment After a Pretended Sale.

1140. Life Insurance Policy as Collateral Security.

1141. Mingling Goods.

§ 1137. **Liability of the Mortgagee to Account After Taking Possession.**—A mortgagee in possession, before the right of redemption is extinguished, is liable to account for the profits of the mortgaged property. The mortgagee of personal property, in possession after condition broken, and while the right of redemption exists, is responsible for diligence in the management and preservation of the property, and is liable for ordinary neglect. In this respect his duties and responsibilities are similar to those of a pawnee. If the property be destroyed without fault on his part, while thus holding it as security for his debt, he cannot be held to account for it. But for the net proceeds of the income or profits, accruing to him before the destruction, he will be accountable.¹

Even a pledgor may go into equity, whenever it becomes necessary to have an account.²

Whenever the property in the possession of the mortgagee, before redemption, is capable of bringing a profit to the mortgagee, it not unfrequently happens that it is necessary to go into equity to take an account.³

After an accounting has been made, and the sum found due, if the mortgagor fails to pay said sum, the mortgagee may sue for the immediate delivery of the property described

¹ *Covell v. Dolloff*, 31 Me. 104; *Craft v. Bullard*, 1 Sm. & M. (Miss.) Ch. 366; *Osgood v. Pollard*, 17 N. H. 271; *Potts v. Stiles*, 17 How. Pr. (N. Y.) 211; *Davis v. Hubbard*, 38 Ala. 185; *Downing v. Palmateer*, 1 Mon. (Ky.) 64.

² *Sims v. Canfield*, 2 Ala. 555.

³ *Davis v. Hubbard*, 38 Ala. 185; *Overton v. Bigelow*, 10 Yerg. (Tenn.) 48.

in the chattel mortgage, or for damages for its detention, to the extent of the amount found due.¹

Where, in an action to recover after foreclosure of a chattel mortgage, the mortgagor sets up as a defense that the mortgagee has accepted the mortgaged property in full satisfaction and discharge of the debt, he cannot then assert, as a ground of defeating the action, that the mortgagee had converted the property and forfeited all rights under the mortgage by removing the property out of the county contrary to the statute relating to foreclosure of chattel mortgages.²

The mortgagee is not always bound to go into equity to foreclose and to account. The subject being personalty, and the condition of the mortgage broken, he has a legal title and the right to take the property into his own possession and sell it fairly, after proper advertisement according to statute, at public sale, and crediting the net proceeds of the sale on the debt, to recover judgment against the mortgage debtor for the balance.³

In general, a mortgagee is entitled to recover the deficiency which remains after applying to the debt the proceeds of sale, especially in the absence of testimony that the sale was not fairly made and for a good price.⁴

Where the mortgagee has taken possession of the property, and has treated it as his own, and after selling part of it has turned over the residue to the receiver appointed in a suit to redeem, it is proper to charge him with the value of the property taken, credit him with the value of that part of it turned over to the receiver, and to refuse to credit him with the expenses incurred by him in disposing of the part sold, he selling it as his own and not in compliance with the terms of the mortgage.⁵

¹ *Gulley v. Copeland*, 102 N. Car. 326, opinion by Smith, C. J.

² *National Ex. Bank v. Holman*, 31 S. Car. 161.

³ *Straub v. Screven*, 19 S. Car. 449.

⁴ *Darnall v. Darlington*, 28 S. Car. 256.

⁵ *Whittemore v. Fisher*, 132 Ill. 243, opinion by Bailey, J.

After taking possession, he was at liberty to convert said goods into cash by sale or by formal foreclosure, or foreclosure in equity, and, if found insufficient to pay the amount due him, to resort to the mortgagor for the deficiency. But it was his duty to exercise the right of sale or foreclosure within a reasonable time after taking possession, or not at all. The mortgagee was not bound to exercise that right, but could hold the property and treat it as his own, subject only to the mortgagor's right to redeem in equity. The electing to hold the property must be treated as a satisfaction of the debt, at least to the extent of its value at the time he takes possession after breach of condition by the mortgagor.¹

After a judgment in favor of the mortgagee for the possession of the mortgaged property, unless there be special findings as to his interests, he is liable to account to the mortgagor, and, if more has been received for the property than the amount of the debt, an action will lie for its recovery.²

§ 1138. **Sales of Mortgagee After Taking Possession.**—When a mortgagee takes possession of a stock of goods and continues the business, making sales and replenishing the stock from time to time by purchase of new goods, such additions become, in equity and as between the parties, part and parcel of the mortgaged stock, to be treated and accounted for as such. Or if the mortgagee purchases another stock of goods and intermingles them with the mortgaged stock and makes sales therefrom without keeping any separate account of such sales, such additional stock also will be treated as a part of the mortgaged goods. Judge Lyon says that in an accounting between the parties in such case,

¹ *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Stoddard v. Denison*, 38 How. Pr. (N. Y.) 296; *Freeman v. Freeman*, 17 N. J. Eq. 44; *In re Haake*, 2 Saw. C. C. 231.

² *Lathrop v. Cheney* (Nebr.), 45 N. W. Rep. 617.

An excess could not be recovered as money had and received, if the complaint has one count in trover and the other in case, in an action of wrongful conversion. *Simpson v. Hinson*, 88 Ala. 527.

the mortgagee should be credited with the amount of the mortgage debt, with the cost of the goods added, and with the expenses of carrying on the business; he should be debited with the amount received from the sale of the goods, whether out of the original stock or the additions thereto. He should be credited with interest on the debt and be debited with interest, from some average or equated time, on the amount which the net receipts from the business reduced the debt. Any amount received from the proceeds of sales by the mortgagor of the mortgaged property need not be included in the accounting, because, if the mortgagor redeems the mortgaged goods, the value of the goods which will then be returned to him will be that amount less than the same would have been had he not sold some of the goods and kept said amount. If the defendant does not redeem and the mortgagee forecloses his mortgage by a sale of the mortgaged property, should the proceeds fall short of paying the mortgage debt, the deficiency would be increased the same amount, and it would be included in his recovery in an action for such deficiency. Hence, this item does not figure in an action of replevin and counter-claim to redeem, and can be properly omitted from the accounting.¹

It is the general rule that, where a person in a fiduciary capacity mingles assets beyond identification, he must suffer all the loss and inconvenience of such confusion; and if the condition of the property is so changed that it cannot be separated, he must pay the value at the time it was taken.²

§ 1139. **Adjustment After a Pretended Sale.**—In an action to redeem property under a chattel mortgage, and for an accounting, and to recover for mortgaged property taken by the mortgagee under a pretended sale, it is not necessary that such sale shall be formally set aside before an accounting is had. The court can adjust and settle the claims of

¹ *Burr v. Dana*, 72 Wis. 639. See, also, *Metzler v. James*, 12 Colo. 322.

² *Mowry v. White*, 21 Wis. 421; *Root v. Bonnema*, 22 Wis. 539; *Mowry v. Nat. Bank*, 54 Wis. 38.

the interested parties when their transactions are not numerous, and do not extend over a long period of time, without compelling the parties to resort to another action.

Thus, the court can adjust the equities where a bill has been filed to redeem property under a chattel mortgage, for an accounting, and an injunction against the disposition of the mortgaged property taken possession of by virtue of a sale by the mortgagor to the mortgagee, which sale is alleged to be fraudulent, it not being necessary to set aside the alleged sale before adjustment.¹

§ 1140. **Life Insurance Policy as Collateral Security.**—While in a technical sense, upon default in payment of a mortgage upon a policy of life insurance, the legal title vests absolutely in the mortgagee, it is subject to the right of the mortgagor to redeem, which right can only be cut off by the mortgagee by taking some proceedings, adequate in law for that purpose; where no such proceedings have been taken, and the mortgagee has, upon the death of the mortgagor, collected the amount of the insurance, whoever has succeeded to the rights of the latter is entitled to the amount collected, less the debt to secure which it was mortgaged, together with premiums and expenses of collection paid by the mortgagee, with interest. To enforce such right, a technical action to redeem is not necessary.

The court, per Earl, J., says that the money received by the mortgagee fully paid his debt, and thereafter he had no right whatever to retain any of the balance, except what he had paid for premiums and his expenses. By the default of the mortgagor to make payment of his indebtedness, the title of the mortgagee to the policy of insurance did not become absolute. "While in a technical sense the legal title became then absolutely vested in the defendant, it was subject to the rights of redemption" on the part of the mortgagor, and that right could be cut off by the mortgagee

¹ *Franks v. Jones*, 39 Kans. 236.

only by taking some proceedings adequate in law for that purpose.

"The mortgage must be deemed to have been paid by the money received by the defendant upon the policy, and he held the balance for the plaintiff, and became indebted to her therefor. To hold that a technical action to redeem was necessary in such a case would be to sacrifice substance to form, under a system of pleadings where mere forms count for but little."¹

In such a case an action for money had and received against the mortgagee, is proper,² and as the complaint demanded a judgment for money, the case was properly triable before a jury, under the New York Code.³

As the relief to which the representative of the mortgagor was entitled was the balance of money due her, she was entitled to no other relief and needed no other. The balance was easily ascertainable, and the "peculiar machinery of an equity court was not needed to ascertain it."⁴

§ 1141. **Mingling Goods.**—Where a mortgagee in possession of the mortgaged merchandise, and without any agreement, sells and replaces some of the stock with new goods, which become intermingled with the old, and are indistinguishable, so that he cannot show the amount of original stock on hand, a decree in a suit for an account and redemption, charging the mortgagor with all the value of the goods delivered to him, is proper, as in such case an original decree of redemption is impracticable.

The mortgagee in possession cannot, by consenting to the sale of the equity of redemption in the property, waive the mortgagor's right to object to its validity.⁵

But in an action for redemption, as applied to mortgaged property remaining on hand, and capable of ascertainment

¹ *King v. Van Vleck*, 109 N. Y. 363.

² *Cope v. Wheeler*, 41 N. Y. 303.

³ Civil Code of Procedure, § 968.

⁴ *King v. Van Vleck*, 109 N. Y. 363.

⁵ *Metzler v. James*, 12 Colo. 322. See *Burr v. Dana*, 72 Wis. 639.

and identification, the court has no power or authority to fix a price upon the mortgaged goods, and require the mortgagee to take them at such a price.¹

ARTICLE IV.—EXTINGUISHMENT OF RIGHT TO REDEEM.

1142. Foreclosure Extinguishes the Right to Redeem.

1143. Two Debts—Judgment on One.

1144. Effect of Part Payment.

§ 1142. **Foreclosure Extinguishes the Right to Redeem.**—After foreclosure of a mortgage, the right to redeem is extinguished.² And a second mortgagee, on a bill to foreclose, can only sell the equity of redemption of the mortgagor, unless the first mortgagee is in a condition to foreclose, and consents to the sale of the entire property.³

§ 1143. **Two Debts—Judgment on One.**—After foreclosure of a chattel mortgage given to two persons to secure two distinct debts, one mortgagee assigned his debt to the other, who recovered judgment for the amount of his original debt. It was held that the whole of the mortgaged property was not thereby opened to redemption, but only so much as, apportioning it between the two debts, would correspond to the debt for which judgment was taken.⁴

§ 1144. **Effect of Part Payment.**—Acceptance of a part payment of the principal of a note is a waiver of the forfeiture, and the time of redemption commences to run again from the time when the last partial payment is made and accepted.

Appleton, C. J., says: "The mortgagee, by receiving this payment, must be regarded as having waived his strict legal

¹ *Bragelman v. Daue*, 69 N. Y. 70.

² *Burtis v. Bradford*, 122 Mass. 129.

³ *Cloud v. Hamilton*, 3 Yerg. (Tenn.) 81; *Gihon v. Belleville Co.*, 3 Halst. (N. J.) Ch. 581; *Potts v. N. J. Arms Co.*, 2 C. E. Green (N. J.) 518. See *Wylder v. Crane*, 53 Ill. 490.

⁴ *Clark v. Robinson*, 15 R. I. 231.

rights. The rights of the parties were the same as if the payment of the note had been thus extended. * * * The mortgagee, by waiving a forfeiture, is to be in no worse condition than if his note had been due at the date of the partial payment.”¹

Several acceptances of part payment of the note are so many waivers of the forfeiture.²

The mortgagee may also extend the time by parol agreement. Weston, C. J., says: “The plaintiff having failed to pay the first note at the time stipulated was a breach of the condition, if the time had not been enlarged. Being enlarged, the condition was saved until the extended time had run out.”³ And the mortgagor may show by parol proof a verbal agreement to extend the period of redemption, and an offer to discharge the mortgage, in pursuance of such agreement.⁴

¹Winchester v. Ball, 54 Me. 558.

²Deming v. Comings, 11 N. H. 474; Dexter v. Arnold, 1 Sum. C. C. 109.

³Flanders v. Barstow, 18 Me. 357.

⁴Deshazo v. Lewis, 5 Stew. & P. (Ala.) 91.



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